SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 20 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968
No. 1133

JACK LOPINSON, *Petitioner*

vs.

COMMONWEALTH OF PENNSYLVANIA, *Respondent*

Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

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INDEX

	Page
Citation to Opinions Below	1
Jurisdiction	2
Statute Involved	2
Questions Presented	3
Statement of the Case	7
Reasons for Granting the Writ	21
Conclusion	35
Appendix A—Opinion of the Supreme Court of Pennsylvania	36
B—Opinion of Trial Court	59
C—Petition for Re-Argument	71
D—Answer to Petition for Re-Argument	90
E—Record Excerpts Relating to Newspaper Publicity	92
F—Record Excerpts Relating to Testimony of Frank Phelan	98
G—Statutes	113

TABLE OF CITATIONS

Cases:

Brady v. Maryland, 373 U.S. 83 (1963)	28
Commonwealth v. Dessus, 423 Pa. 177 (1966)	23, 24
Commonwealth v. Patrick, 416 Pa. 437 (1965)	19, 20
Commonwealth v. Powell,—— Pa.—— A.2d ——(Nos. 374, 423, January Term, 1967, decided January 3, 1968)	17, 25, 26
Commonwealth v. Schmidt, 423 Pa. 432 (1966)	20, 26

TABLE OF CITATIONS—*Continued*

Cases: Page

Douglas v. Alabama, 380 U.S. 415 (1965) 29

Escobedo v. Illinois, 378 U.S. 478 (1964) 6, 26

Francis v. Reswebber, 329 U.S. 459 (1947) 31

Jencks v. United States, 353 U.S. 657 (1957) 15, 28

Johnson v. New Jersey, 384 U.S. 719 (1966) 6

In Re Kemmler, 136 U.S. 436 (1890) 31

Miranda v. Arizona, 384 U.S. 436 (1966) ..6, 19, 20, 26

Pointer v. Texas, 380 U.S. 400 (1965) 29

Roviaro v. United States, 353 U.S. 53 (1957) 28

Sheppard v. Maxwell, 384 U.S. 333 (1966) ...21, 22, 23

Witherspoon v. Illinois (Miscellaneous Docket No. 344) 30

United States Constitution:

Fifth Amendment 15

Sixth Amendment 4, 5, 27, 29

Eighth Amendment 6, 31

Fourteenth Amendment 3, 4, 5, 6, 27, 29

United States Statute:

28 U.S.C. §1257(3) 2

Pennsylvania Statutes:

Act of June 29, 1913, P.L. 528, §1 2

Act of June 24, 1939, P.L. 872, §701; as amended by the Act of December 1, 1959, P.L. 1621, §1 2

Other Authority:

Oberer, Walter E., 39 *Texas Law Review* 545 (May, 1961), condensed in the April 6, 1964 issue of *The Nation* 30

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Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Pennsylvania, entered in the above entitled case on September 26, 1967, affirming the judgments and sentences of the Court of Oyer and Terminer of Philadelphia County, Pennsylvania.

Citations to Opinions Below

The opinion of the Supreme Court of Pennsylvania is reported at 427 Pa. 284, 234 A. 2d 552 (1967) and is attached hereto as Appendix "A" (pp. 36 to 58, infra).

The opinion of the Trial Court is unreported and is printed in Appendix "B" hereto. (pg. 59 to 70, infra).

Jurisdiction

Petitioner was tried before a jury on two bills of indictment charging Petitioner with murder. He was found guilty and sentenced by the Trial Court to death in the electric chair following separate jury verdicts fixing this penalty. The jury trial verdicts of guilty and fixing the death penalty were entered on March 4, 1965.

Following hearing and argument, the Trial Court denied Petitioner's motions for new trial and in arrest of judgment and on November 8, 1965, entered judgment of guilty on the bills of indictment and sentenced Petitioner to death in the electric chair on each bill.

Petitioner subsequently appealed to the Supreme Court of Pennsylvania. The Trial Court's judgment and sentence were affirmed by the Supreme Court of Pennsylvania by opinion and order entered on September 26, 1967. Petition to the Supreme Court of Pennsylvania for reargument was denied by order entered November 24, 1967.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Statute Involved

The statutory provisions involved are Pennsylvania Statutes, Act of June 24, 1939, P.L. 872, §701; as amended by the Act of December 1, 1959, P.L. 1621, §1, and the Act of June 19, 1913, P.L. 528, §1.

Questions Presented

1. In a murder case where public reaction is extremely high and newspaper publicity adverse to Petitioner is unprecedented in volume and nature, has Petitioner been denied due process of law and equal protection of the laws by the Commonwealth of Pennsylvania where he is indicted immediately following his arrest without any opportunity to challenge the array of any member of the Grand Jury or even to investigate and ascertain whether grounds for challenge exist?

2. In the face of such unprecedented adverse newspaper publicity, which included extrajudicial statements of police officials, the prosecutor and other officials of the Court, has Petitioner been denied a fair trial in violation of the Fourteenth Amendment to the Constitution of the United States by Trial Court rulings denying Petitioner's requests for postponement of the trial and the Trial Court's refusal to make any effort or attempt to direct press reporters in attendance at the trial from publishing extrajudicial matters prejudicial to Petitioner?

3.* Has Petitioner been deprived of a fair trial in violation of the Fourteenth Amendment to the Constitution of the United States where the Trial Court has permitted many witnesses to give damaging and prejudicial and inadmissible hearsay testimony, and where, on appeal, the Supreme Court of Pennsylvania holds that the rulings of the Trial Court pertaining to the hearsay testimony are clear error, but not sufficient error to warrant a reversal of the convictions?

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* Questions 3 and 7 are not urged as independent reasons for granting the writ, but if this Petition is granted, the questions will be briefed and argued to show that many errors were made, most of which standing alone might be "harmless", but that all errors considered in the aggregate add up to an unfair trial and a denial of due process.

4. Has Petitioner been denied a fair trial in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States where, in the face of extraordinary adverse newspaper publicity the Trial Court unduly restricts and limits examination of jurors on the voir dire as to knowledge and opinions formed as a result of the newspaper stories?

5. Has Petitioner been denied a fair trial in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, which incorporate the right of confrontation contained in the Sixth Amendment to the United States Constitution, where the major Commonwealth witness is permitted to testify at the trial with his eyes and portions of his face concealed from the view of the defendant and the jury by heavy black glasses which the witness is not required to wear for any medical or opthalmological reasons?

6. Has Petitioner been denied a fair trial in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, which incorporate the right of confrontation contained in the Sixth Amendment to the United States Constitution, where the major Commonwealth witness against the defendant refuses to answer proper questions on cross-examination and the Court refuses to direct the witness to answer such proper questions on the ground that such witness himself is an admitted murderer facing a death sentence and the Court concludes it is therefore powerless to compel answers by threat of punishment for contempt?

7. Has Petitioner been denied a fair trial in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States where the Commonwealth is permitted to produce several witnesses to give rebuttal testimony as to the character and reputation of Petitioner and where such witnesses are permitted to characterize Petitioner as a "scoundrel" and "unmitigated liar"?

8. Has the Petitioner been denied rights guaranteed by the Sixth Amendment to the United States Constitution, as incorporated into the Fourteenth Amendment to the Constitution, where, subpoenas issued and served upon witnesses are quashed, without hearing, by the Court because they call for the production of illegally obtained wiretap transcripts?

9. Where a defendant is convicted of murder and sentenced to death chiefly on the testimony of a witness who is the alleged co-conspirator and accomplice of the defendant, does due process and a fair trial require the prosecutor to disclose to the defendant evidence and reports in the prosecutor's possession concerning such witness which would be favorable to the defense, and does suppression of such evidence or reports by the prosecutor constitute a denial of due process?

10. Has Petitioner been deprived of the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States where the Supreme Court of Pennsylvania decides in another case subsequent to the instant case, but actually pending at the same time, that the use of gruesome and inflammatory color slides of homicide victims is not to be permitted in a murder trial where the Commonwealth pathologist can adequately and effectively testify without the use of such photographs, but fails to consider and rule upon the very same question raised by Petitioner in his appeal?

11. Does the examination of prospective jurors as to their conscientious scruples relating to the imposition of the death penalty and the rejection of all jurors who manifest scruples or hesitancy against the imposition of the death penalty deprive the Petitioner of trial by a jury of his "peers" in violation of the due process and equal protection of the laws provisions of the Fourteenth Amendment to the United States Constitution?

12. Is the imposition of the death penalty by a State as punishment for crime a cruel and unusual punishment prohibited to the States by the Fourteenth Amendment to the Constitution of the United States incorporating therein the provisions of the Eighth Amendment?

13. Does the imposition of the death penalty against Petitioner deprive Petitioner of equal protection of the laws as guaranteed to him by the Fourteenth Amendment to the United States Constitution where in other cases other persons convicted of first degree murder are sentenced to life imprisonment?

14. May statements taken from Petitioner by police officers be admitted as evidence against Petitioner where the statements were taken without counsel being present and without Petitioner having been advised of his Constitutional right to counsel and the Constitutional right to remain silent where the trial of the case is subsequent to this Court's decision in *Escobedo vs. Illinois*, 378 U.S. 478 (1964) but prior to *Miranda vs. Arizona*, 384 U.S. 436 (1966) and *Johnson vs. New Jersey*, 384 U.S. 719 (1966), but where at the trial Petitioner's counsel specifically challenges the admissibility of the statements on the very ground that appellant was not informed of his Constitutional rights at the time of his interrogation by the police?

15. Has Petitioner been deprived of life and liberty in violation of the Fourteenth Amendment of the United States Constitution where the Trial Court and the Supreme Court of Pennsylvania summarily dismiss, without hearing, Petitioner's timely application for a new trial based on essential facts and evidence discovered following the trial, but prior to the entry of judgment on the jury verdict and the imposition of sentence?

16. Has the Supreme Court of Pennsylvania deprived Petitioner of life and liberty in violation of the Fourteenth Amendment of the United States Constitution in affirming convictions of murder and the imposition of the death sen-

tence in an opinion and order where certain essential facts, upon which the opinion is predicated, are mis-stated and it is obvious that the appellate court has based its opinion, in part, on factual errors made by it and when the factual errors are called to the Court's attention in a timely petition for re-argument the Court denies such re-argument?

Statement of the Case

Petitioner was convicted of murder with sentence of death being imposed by a jury after a trial in the Court of Oyer and Terminer of Philadelphia County. The homicides occurred in the City of Philadelphia on June 19, 1964, in the basement of Dante's Restaurant, located at 1809 Chestnut Street. Indictments charged Petitioner with the murders of Judy Lopinson, his wife, and Joseph Malito, his Dante's Restaurant partner.

Petitioner was arrested July 15, 1964, by the Medical Examiner of Philadelphia, following an inquest conducted by the Examiner. These proceedings are reported in the Record at pages 4a to 292a. Petitioner was denied any right to participate in the inquest proceedings and the right to examine, either personally or by counsel, any of the witnesses who were called and testified. At the conclusion of the inquest and the arrest of Petitioner the two Bills of Indictment were presented by the District Attorney to the Grand Jury of Philadelphia County which indicted on both Bills. Petitioner was never afforded a preliminary hearing or any other opportunity to cross-examine the witnesses who appeared against him at the inquest or before the Grand Jury.

From the date of the homicides until the conclusion of the trial, this case received probably more publicity than any other case in the history of Pennsylvania.

From June 19, 1964, to September 11, 1964, Petitioner had been represented first by an attorney who was involved in the case as a witness and principal, and then for a short time by other privately retained counsel. On September 11,

1964, after indigency proceedings, the undersigned counsel were appointed by the Trial Court to represent Petitioner. Following that appointment a number of pre-trial motions and petitions were filed and disposed of by the Trial Court. The pre-trial motions are set forth in the Record at pages 496a to 1050a.

Petitioner moved to quash the indictments on the ground that he had been indicted within minutes following his arrest and thereby had been deprived of legal and constitutional rights in not being given the opportunity to challenge the array of the Grand Jury and individual jurors regarding prejudice caused by the exceptional publicity. The motion to quash and the proceedings relating thereto are set forth in the record starting at page 616a. The opinion of the Trial Court dismissing the motion is reported at page 733a. The dismissal was appealed to the Supreme Court of Pennsylvania, which quashed the appeal without hearing, on motion of the Prosecutor.

On January 18, 1965, the case proceeded to trial over Petitioner's objections to trial at a time of tremendous prejudicial publicity. All applications for continuance were denied on the ground that the Trial Court could not control the press (and refused to make any attempt to do so). Jury selection was made in the prejudicial atmosphere of an unbridled press.

At the trial, the Commonwealth's presentation included more than fifty witnesses and sixty exhibits. The defense included thirty-six witnesses and twelve exhibits. The verdict was rendered March 4, 1965, forty-five days after commencement of the trial.

Motions for a new trial and in arrest of judgment were timely filed with the Trial Court. These motions are reported at pages 6044a and 6045a of the Record, and the oral argument relating thereto on pages 6053a et seq. All of the questions here presented were raised at that time or resulted from the State Supreme Court's opinion.

Prior to the lower court's disposition of the motions, the Commonwealth's essential witness, Frank Phelan, recanted

his testimony. Petitioner also gained access to previously withheld evidence regarding the mental competency of this witness. By petition filed with the Trial Court a hearing was sought for the purpose of presenting evidence on these points for consideration by the Trial Court with respect to the pending motions for new trial. The petition was summarily dismissed, without hearing, by the Trial Court. The petition is set forth in the Record at page 6035a. Petitioner appealed the dismissal to the Supreme Court of Pennsylvania but on motion of the Commonwealth, and again without hearing, the Supreme Court of Pennsylvania quashed the appeal.

On November 8, 1965, the Trial Court denied Petitioner's motions for a new trial and in arrest of judgment and imposed the sentence of death. An appeal to the Supreme Court of Pennsylvania immediately followed and on May 12, 1966, the Trial Court filed with the Supreme Court of Pennsylvania its opinion in support of its denial of the motions. The opinion of the Trial Court is set forth at page 6348a et seq. of the Record and is attached hereto as Appendix "B" (pp. 59 to 70, infra).

At the trial of the case, it was the Commonwealth's theory that the murders were actually committed by Frank Phelan, who was hired to do so by Petitioner. Frank Phelan so testified. In purported substantiation of the testimony of Frank Phelan, the Commonwealth called many witnesses who testified concerning Petitioner's financial affairs and marital infidelities. Much of the testimony produced by the Commonwealth of this nature was admittedly inadmissible hearsay.

On September 26, 1967, the Supreme Court of Pennsylvania affirmed. The opinion and order of the Supreme Court of Pennsylvania is reported in 427 Pa. 284, 234 A. 2d 552, and is also attached hereto as Appendix "A." (pp. 36 to 58, infra).

Petitioner filed his timely comprehensive petition for reargument setting forth that the Supreme Court of Pennsylvania had made a series of factual errors in its opinion.

The opinion contained several conclusions of law based on facts completely contrary to the facts contained in the Record. The Commonwealth's answer failed to deny or dispute that the opinion of the Supreme Court of Pennsylvania did in fact contain the errors. The petition for reargument was denied November 24, 1967. The petition and answer are attached hereto as Appendix "C" (pp. 71 to 89, infra) and Appendix "D" (pp. 90, 91, infra) respectively.

The federal questions sought to be reviewed in these proceedings were raised in the Trial Court and in the appellate court at the following stages and in the following manners:

1. The denial of due process resulting from Petitioner's indictment within minutes following his arrest was raised by pre-trial motion to quash the indictments (R 616a). The denial of the motion to quash was appealed to the Supreme Court of Pennsylvania following the action of the Trial Court and was raised again in the appeal following judgments and sentencing (R 739a to 751a).

2. The question of adverse publicity was raised by Petitioner's motions for continuance before trial and during jury selection (R 1058a, 1165a, 1344a, 1550a). At those times counsel for Petitioner also urged upon the Trial Court that it make some effort to control the news reporters who were in the courtroom by directing that matters not dealt with in open court be excluded from the news reports. The following colloquy between counsel for Petitioner and the Court appears on the Record at pages 1346a to 1351a:

> "MR PERUTO: I don't say that you can restrict them, sir; but this I do say: Unless we have something by nature of a Court order, after all, the Judge runs the courtroom, regardless of the freedom of the press, and I think that unless the Court does something; namely, order them not to print stories, but, rather, factual reports, and even then no factual reports which could possibly disturb the trial, such as what has be-

come of evidence, and the importance of evidence, et cetera, or leading stories indicating guilt of the defendant, I say this, it is not a question primarily of whether or not the press has a right to print, but whether or not the defendant's right to fair trial is deprived him because of the press. Now, we have two conflicting rights. And Your Honor said—

"THE COURT: You told us that yesterday. You don't have to repeat yourself. What is your application now?

"MR. PERUTO: The other point I want to make is this: Your Honor says we don't have a right to stop them. Without arguing that point, let me just say this: If I went up to prospective jurors and said to them the same things that are printed in these newspapers, I am certain, and Your Honor would be perfectly proper in doing so, I am certain that I would immediately be held in contempt of Court.

"THE COURT: You said that yesterday, or Mr. Spivack did, one or the other."

In the same connection the Trial Judge went on to say:

"Now, more specifically on the application today, I cannot restrict the press on this. They are not parties before me. I can't prohibit them from entering the courtroom. I can't prohibit the press from coming into the courtroom and printing in the newspaper anything that is said in the courtroom. That's what they have done.

"The jurors already selected, I am sure they did not get the information from any other source and they apparently have some feature writers on the staff of the newspaper and they are writing up some aspects of this case as if it were a novel they were writing, but, there again, I don't see how you can restrict that." *

* A sampling of the pre-trial newspaper publicity is set forth as Appendix "E" hereto (pp. 92 to 97, infra).

3. The Commonwealth, through six witnesses, named below, offered inadmissible hearsay testimony, which supplied the entire motive and explanation for the murders in accordance with the Commonwealth's theory of the case. Objections to the inadmissible hearsay were raised at the trial by Petitioner during the questioning of Pasquale Joseph Vincent Malito (R 3678a-3679a); Jean Salvi (R 5638a-5641a); Rosemary DiPlacido (R 5646a-5648a); Sidney Cardonick (R 3626a-3631a); Detective Rocco Molinari (R 3645a); and David Seflin (R 5455a-5656a). The Trial Court admitted the objectionable hearsay upon the Prosecutor's assertion that he did not seek to prove the truth of the hearsay, but sought to admit it merely to prove the "victim's intent" and the "state of mind" of the decedent. However, in summation to the jury, the Prosecutor cited the same hearsay as proof of facts, arguing that such facts established Petitioner's motive (R 4745a and R 5889a). The devious tactic of the Prosecutor in offering the evidence, not as proof, but subsequently arguing it vigorously to the jury as proof was included as a ground for a new trial before the Trial Court and was raised in the appeal to the Supreme Court of Pennsylvania. The Supreme Court in its opinion recognized, but glossed over, the import of the Prosecution tactic, stating:

> "However, in view of all the testimony in the case, we are convinced it had no influence on the verdict, even though the Commonwealth did refer to it vigorously, but briefly, in its summation. It was, therefore, harmless error." (427 Pa. 284, 307; 234 A 2d 552, 565 Appendix "A", p. 53, infra).

4. The unfair limitations and restrictions imposed upon Petitioner's counsel in the examination of prospective jurors was repeatedly raised throughout the jury selection stage of the trial. For example, prospective juror Helen J. Koschusko, stated that she had read about the case in the newspapers and she thought it involved a very hideous crime.

She further stated in response to the question as to whether she knew of any reason why she could not be fair to both sides, "No, I think there is two sides to every story and you should listen to both sides." (R 1192a) Following this statement, she was asked by Petitioner's counsel: "Well, could you follow the instructions of the Court with regard to whether or not there would be two sides of the story for you to hear?" The Court sustained the Commonwealth's objection to this question, yet it is elementary that in a criminal prosecution conducted under the American System of Jurisprudence that there is no burden upon a criminal defendant to present any defense.

Another example relates to the prospective juror Helen Drabyk. She admitted having read and heard about the case. She was asked if what she read in the newspapers caused her to feel that she could not enter the jury box with a perfectly open and fair mind. The Trial Court refused to permit her to answer this question (R 1329a).

Prospective juror Clarence Depue acknowledged that he knew about the case because he had "read headlines and things like this." Petitioner's counsel asked him if he did not read the rest of the newspaper. The Court sustained the Commonwealth's objection to that question and Mr. Depue did not answer it (R 1437a). A similar objection was sustained with respect to the prospective juror Harry J. Donnelly (R 1475a).

Prospective juror James C. Hills also stated that "you must hear both sides." The Court ruled as before on this question (R 1515a-1517a). Petitioner's counsel was not even permitted to ask a prospective juror who, when asked if he would consider all possible verdicts, including the verdict of not guilty, answered: "If the person were proven not guilty, of course," whether he would follow the Court's instruction as to the law that there is no burden upon the defendant to prove his innocence (R 1653a-1654a). The severe limitations of voir dire examination resulted in Petitioner's exhaustion of all peremptory challenges allowed by the Court.

5. and 6. The essential Commonwealth witness, Frank Phelan, was a co-defendant, not on trial with Petitioner. However, the Trial Court, over objection, severely restricted and limited Petitioner's cross-examination and upheld the witness' refusal to answer proper questions. Frank Phelan testified while wearing black glasses hiding his eyes. Despite Petitioner's repeated demands the Trial Court refused to direct the witness to remove the glasses to allow the jury to see his eyes, even though the witness admitted that the glasses were worn by choice rather than medical necessity. The witness gave as his reason for wearing and refusing to remove the black glasses: "I'm not here for display; I'm here to relate a story about Dante's" (R 2722a). There is attached to this Petition as Appendix "G" a number of excerpts from the Record which illustrate how the questions relating to the right of Petitioner to confront his accuser and the right of Petitioner to a fair trial *and due process* were denied by the Court's overruling of motions to direct the witness to answer proper questions and by the Court's denial of other motions to strike the witness' testimony because of his refusal to answer questions and by the denial of Petitioner's motions for the withdrawal of a juror. The Trial Court's justification for failing to direct the witness to answer proper questions which the witness refused to answer was that the Court was powerless to make such an order because the witness himself was an admitted murder facing a death sentence and that to threaten such a witness with punishment for contempt if he did not answer questions was therefore "futile" (R 2469a-2470a and Appendix "B," p. 65).

7. The question of fair trial and due process was likewise raised during the trial and on appeal to the Supreme Court of Pennsylvania in connection with Commonwealth witnesses who were permitted, over objection and without any control or admonition by the Trial Court, to call Petitioner a "scoundrel" and an "unmitigated liar" (R 5442a). The Supreme Court of Pennsylvania acknowledged that the Trial Court should have limited these rebuttal character wit-

nesses to mere statements of the Petitioner's general reputation for truthfulness in the community but the Supreme Court of Pennsylvania went on to say that the failure of the Trial Judge to do so "is not of such moment as to require a new trial." ,427 Pa. 284, 309; 234 A. 2d 552, 566, Appendix "A", p. 55, infra).

8. Based on reliable information, Petitioner subpoenaed the District Attorney and the Police Commissioner of Philadelphia for the appearance and the production of certain transcripts and tape-recordings of telephone conversations between Frank Phelan and Petitioner. The transcripts resulted from wiretapping by the police of the telephone of Petitioner's father and served as the basis for obtaining the testimony of Frank Phelan. Petitioner, when apprised of the existence of the transcripts, considered them as essential aids in the impeachment of the major Commonwealth witness. On petition of the Prosecutor the subpoenas were quashed by the Trial Court without hearing (R 3156a-3167a). The grounds urged by the Commonwealth in support of its petition were first that the subpoenas called for the production of illegally obtained evidence and secondly, that the evidence was the work product of the police and the District Attorney. The Trial Court rejected Petitioner's arguments that under the decision in *Jencks vs. United States*, 353 U.S. 657 (1957), Petitioner was entitled to all statements of any witness in the possession of the prosecutor or the police and that if the Police Commissioner and District Attorney sought to avoid producing the statements because the admission of the commission of a crime was involved in obtaining them, then the subpoenaed witnesses themselves should be required to plead the protection of the Fifth Amendment (R 3156a-3167a). Although the quashing of the subpoenas was challenged in the appeal to the Supreme Court of Pennsylvania as a denial of the right to process guaranteed to the Petitioner by both the Federal and State Constitutions, in its opinion the Supreme Court makes no mention or reference to this error of the Trial Court.

9. Despite the fact that the pre-trial newspaper reports of the case revealed that the witness Frank Phelan had been examined by the Court psychiatrist and by other psychiatrists retained by his own counsel, Petitioner had no basis on which to expect that the mental competency of this witness was a factor in the case until the witness took the stand and testified. Although Petitioner had made a pre-trial application to the Court for authority to retain a psychiatrist as a specialist to aid in the defense, the request was denied by the Court. The petition is set forth in the Record at pages 496a through 498a and the Record at pages 512a-513a shows that one of the reasons why a psychiatrist was indicated was to aid the defense with respect to matters unrelated to the mental condition of the Petitioner. However, after Frank Phelan's testimony, very little doubt remained that a serious question as to the witness' competency did exist. During his testimony on the stand, Phelan stated that he was a user of drugs, that he had been furnished with drugs by prison authorities during his incarceration while awaiting trial (R 2373a-2375a), that he had urges to kill people and that he needed no reason to kill; that he had a desire to "blow up" the courtroom and kill everyone in it; that he had a desire to "float" to the electric chair and to have the Petitioner "float" with him. (R 2725a).

On the basis of the testimony of the witness Petitioner renewed his request to the Court that Petitioner be permitted to retain a psychiatrist to aid in the defense (R 2875a). The request was opposed by the Prosecutor (R 2965a) and denied by the Court (R 2968a).

When the request was denied, Petitioner then requested that the Court order the Prosecutor to turn over to the defense psychiatric reports of the witness which were in the possession of the Prosecutor. One report had been made by the Court's own neuro-psychiatric division and the other by a psychiatrist retained by the Prosecutor who had examined the witness. The Prosecutor opposed these requests, although acknowledging that the reports were in his posses-

sion, and the Court, concurring with the Prosecution, refused to direct that the reports be turned over to Petitioner's counsel (R 2973a).

In addition to information concerning the mental condition of the witness Frank Phelan, the Prosecution had in its possession other evidence and material relating to this witness which might have been of material benefit to the defense. Yet, instead of making available to counsel any information concerning the witness, the Prosecutor regarded his function as solely that of an advocate who had to win at any cost and was therefore enjoined from revealing anything of which he was possessed which might have proven favorable to Petitioner.

10. The objections to the use of the gruesome, horrible and inflammatory color photographs projected for display to the jury were raised during the trial and on appeal to the Supreme Court of Pennsylvania. Reproductions of the photographs projected for the Jury's view are contained in the Record at pages 6500a through 6507a. In its opinion the Supreme Court does not rule on or even mention the questions relating to Petitioner's objections to the use of the photographs. The thrust of Petitioner's objection was that the testimony of the Commonwealth pathologist and the pathologist's own admission clearly demonstrated that the pictures were not of importance in letting the Jury know how the victims were killed. This was thoroughly and effectively done and accomplished by the testimony of the pathologist. Yet, without even a mention of this point in its opinion, the Supreme Court of Pennsylvania, just three months after deciding the instant case, ruled that it is reversible error in Pennsylvania for a judge to permit exhibition of inflammatory color slides of homicide victims in a case where the pathologist can adequately and effectively testify without showing the photographs to the Jury. See *Commonwealth vs. Powell*, ——Pa. —— A. 2d —— (Nos. 374, 423, January Term, 1967, decided January 3, 1968).

11, 12, 13. The constitutionality of the death sentence as punishment for crime and the related question as to whether a criminal defendant may obtain a fair trial from a jury composed of individuals who have been selected because they do not have conscientious or religious scruples against imposing the death penalty was raised before the Trial Court in support of the motions for new trial and in arrest of judgment and was also raised on appeal to the Supreme Court of Pennsylvania. Neither Court in their respective opinions dealt with or ruled on the question. The question of death in the electric chair as constituting a cruel and unusual punishment was not raised either in the Trial Court proceedings or on appeal.

14. At the trial objections were overruled to the admissibility of the statements of Petitioner made during police interrogation while he was a suspect. On appeal the Supreme Court of Pennsylvania erroneously stated in its opinion that the objections were not properly founded because Petitioner's counsel was present at all times during the questioning of Petitioner. The Record clearly demonstrates that this was not so. At page 8935a it is clearly established that counsel was not present when Petitioner was questioned and that Petitioner was not warned of his Constitutional rights:

> DETECTIVE JAMES WEISBACK (Cross Examination): . . .
>
> "Q. Did you ask the defendant if he desired counsel before you questioned him?
>
> A. No, sir, I did not.
>
> Q. In your presence did anyone else mention anything with regard to legal assistance to the defendant?
>
> A. Not in my presence, sir.
>
> Q. Did you tell the defendant that anything that he would say could be used against him?
>
> A. No, sir, I did not."

The Record also establishes with the utmost clarity that Petitioner raised the very question of no counsel and no

warning before the Trial Judge and that the Trial Judge, relying on legal authority of *Commonwealth vs. Patrick*, 416 Pa. 437 (1965), since overruled by *Miranda vs. Arizona*, 384 U.S. 436 (1966), overruled Petitioner's objections to the admissibility of the statements. See R 4015a and 4016a:

"MR. SPRAGUE: I will ask Your Honor to rule upon the admissibility of these statements, then, sir.

THE COURT: Do you wish to say anything?

MR. PERUTO: Simply to point out three things, sir. That at the time of the making of this statement the defendant was without counsel, not having been warned of his rights or in any fashion stated that whatever was to be said was to be used as evidence against him.

Also at the time of the making of the statement the defendant was wounded and was in pain, as is evidenced by the fact that the doctor said that that sort of wound would produce pain. And the records themselves show that thereafter he was given certain drugs to relieve pain.

And I think that, therefore, they are circumstances surrounding the time of the giving of the statement; and, therefore, the statement could not be considered as one given with the knowledge of his rights or in such frame of mind as to be held responsible for his statements.

THE COURT: Do you wish to say anything, Mr. Sprague?

MR. SPRAGUE: Yes, sir.

That there is no requirement that the defendant at this stage had to be advised as to any rights. The only issue is whether or not what he said was voluntary. And the Court can rule upon this.

The latest case passing upon this is the case of Commonwealth of Pennsylvania versus Charles

Patrick. And I quote what the Supreme Court of Pennsylvania said there:

> 'We conclude that a statement or confession made during interrogation by the police, if voluntarily made, may be constitutionally admissible in evidence, even though the accused was neither warned of his right to remain silent nor of his right to counsel.' "

On the basis of *Commonwealth vs Patrick*, the Trial Court below ruled that Petitioner's statements were voluntary and therefore admissible even though the Record clearly shows no warning to Petitioner of his constitutional rights.

Although the Supreme Court since *Commonwealth vs Patrick* has now made it very clear that the law of the Commonwealth, in line with the *Miranda* decision, is that police questioning of a suspect is unconstitutional in the absence of counsel unless the suspect is effectively warned of his right to remain silent (*Commonwealth vs Schmidt*, 423 Pa. 432 [1966]), when the point was referred to in the opinion of the Supreme Court, the Supreme Court dismissed it on the erroneous statement that counsel was present at all times when the Petitioner was interrogated.

15. The Petition for leave to file supplemental reasons in support of the motions for new trial and in arrest of judgment and for a hearing thereon based upon allegations of newly acquired information and newly discovered evidence was summarily dismissed by the Trial Court. On appeal to the Supreme Court of Pennsylvania the dismissal without hearing was briefed and argued as an additional ground for reversal of the lower court judgments. The Supreme Court of Pennsylvania, by erroneous statements contained in the brief of the Commonwealth was misled into overruling Petitioner's arguments on this point on the ground that Petitioner had failed to answer the Commonwealth's request that the Petition be supported by

specific allegations as to the newly acquired information and newly discovered evidence. The actual fact is that Petitioner had no opportunity to respond to the Commonwealth's motion because the Trial Court dismissed the Petition, without any hearing, on the same day that the Commonwealth filed its motion. The only opportunity that Petitioner had to call the Supreme Court of Pennsylvania's attention to the erroneous factual statement contained in its opinion was by petition for reargument which was timely filed and which did demonstrate to the Supreme Court the errors made by it in its factual recitals and conclusions. See Appendix "C" attached hereto (pp. 71 to 89, infra).

16. The factual errors contained in the opinion of the Supreme Court of Pennsylvania were raised by petition for re-argument filed pursuant to the rules of the Supreme Court of Pennsylvania within ten days of the issuance of the Court's opinion. The petition for re-argument and the answer of the Commonwealth with respect thereto are set forth in Appendices "C" and "D" respectively.

Although the petition for re-argument recites factual errors made by the Supreme Court of Pennsylvania in such a vital area as the constitutional right to counsel, and although the Commonwealth's answer to the petition for re-argument does not challenge or in any way dispute the claimed errors, the Supreme Court, without hearing, summarily denied the petition for re-argument, thus allowing its factually inaccurate opinion to remain the law of the case and the law of the Commonwealth.

Reasons for Granting the Writ

1. The Trial Court's rulings relating to the newspaper publicity surrounding the case were clearly contrary to the decision of the Supreme Court in *Sheppard vs. Maxwell*, 384 U. S. 333 (1966). At the time of the Trial Court's rulings, the *Sheppard* case had not yet been decided. However, it had been decided by the time the Pennsylvania Supreme Court considered the appeal. Despite this fact

and the additional fact that the *Sheppard* case was extensively argued on appeal, the Pennsylvania Supreme Court gave the question only superficial treatment in its opinion and completely ignored the precise rulings of the Trial Court which were held to be erroneous in *Sheppard.* For example, the Trial Court overruled motions for continuances and Petitioner's request that the Trial Court order the newspaper reporters in the courtroom to print only factual reports of the proceedings rather than extrajudicial "color" stories and commentaries and features discussing evidence and statements not part of the case as unfolded in the courtroom. The trial Court claimed inability to control the press, while this Court stated in the *Sheppard* case it was the Trial Court's duty to do so. The Trial Court stated: ". . . They apparently have some feature writers on the staff of the newspapers and they are writing up some aspects of this case as if it were a novel they were writing, but, there again, I don't see how you can restrict that."

In the *Sheppard* case this Court specifically stated what the Trial Court could and should have done:

> (a) . . . The judge should have at least warned the newspapers to check the accuracy of their accounts (384 U. S. 333, 360).
>
> (b) . . . The judge should have further sought to alleviate this problem by imposing control over the statements made to the news media by counsel, witnesses and specifically the Coroner and police officials (384 U. S. 333, 360).
>
> (c) . . . The trial court might well have proscribed extra-judicial statements by any lawyer, party, witness or court official which divulge prejudicial matters . . . the identity of prospective witnesses or their probable testimony . . . any belief in guilt or innocence . . . or like statements concerning the merits of the case (384 U. S. 333, 361).

(d) . . . The Court could also have requested the appropriate city and county officials to promulgate a regulation with respect to dissemination of information about the case by their employees (384 U. S. 333, 362).

(e) . . . Reporters who wrote and broadcasted prejudicial stories, could have been warned to the impropriety of publishing material not introduced in the proceedings (384 U. S. 333, 362).

Perhaps the most important ruling of the *Sheppard* decision and the one most clearly ignored by the Supreme Court of Pennsylvania is the conclusion by this Court that where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, *the Judge should continue the case until the threat abates* (384 U. S. 333, 363).

The instant case and the *Sheppard* case have very many parallels. For a state appellate court to ignore these similarities and to ignore the precise points which fit exactly into the rulings and holdings of the Supreme Court of the United States has the effect of limiting this Court's decision to only the specific case before it. It is urged that the ruling of the *Sheppard* case was intended to apply to every criminal proceeding, including the instant case and not merely to Sam Sheppard.

2. The decision of the Supreme Court of Pennsylvania and its opinion affirming the judgments and sentences of the lower court ignore three recent decisions of the same court dealing with federally guaranteed constitutional rights.

(a) Subsequent to the trial of the instant case but prior to the appeal to the Supreme Court of Pennsylvania, that Court handed down the decision in *Commonwealth vs. Dessus*, 423 Pa. 177 (1966). In the *Dessus* case, an indictment for murder was quashed on the ground that

it was unconstitutional for the defendant to have been indicted by the Grand Jury the same day as his arrest. This, the Supreme Court of Pennsylvania held, constituted an effective denial of due process because the defendant was not afforded an opportunity for challenging the array within a reasonable time or proving by legally competent evidence that one or more of the Grand Jurors should be disqualified for cause. In its opinion in the instant case the Supreme Court of Pennsylvania distinquished the *Dessus* case on the ground that it was based on new rules of criminal procedure which had come into effect subsequent to the indictment in the instant case ignoring the substantive constitutional right set forth in *Dessus*. In the instant case, the Court said, Petitioner had the opportunity to challenge even after his indictment because the law prior to the new rules of criminal procedure permitted motions to quash indictments based on qualifications of Grand Jurors even after indictment. This was an erroneous application by the Supreme Court because of the record facts in the instant case.

Petitioner was arrested on July 15, 1964. He was indicted the same day. Under the procedure of indictment immediately following arrest no preliminary hearing was ever afforded to Petitioner. Approximately two months after arrest and indictment counsel for Petitioner were appointed by the Trial Court. By this time the Grand Jury that had indicted Petitioner had served its term and was discharged. It was a virtual impossibility for counsel appointed two months after indictment to then seek to discover whether grounds had existed at the time of indictment for challenging members of the Grand Jury. Counsel for Petitioner nevertheless did file a motion to quash the indictment on the ground that no opportunity existed for challenging the Grand Jury and that it was too late at that time to seek to discover whether actual grounds for challenge might have existed and Petitioner was denied due process just as *Dessus* had been.

(b) Another decision dealing with precisely the same question as was raised in the appeal in the instant case was handed down on January 3, 1968 by the Supreme Court of Pennsylvania. Reference is made to the case of *Commonwealth vs. Powell*, —— Pa. ——, — A. 2d —— (Nos. 374, 423 January Term, 1967). In the *Powell* case the Supreme Court of Pennsylvania said:

> "We are of the opinion that the proper test to be applied by a trial court in determining the admissibility of photographs in homicide cases is whether or not the photographs are of such essential evidentiary value that their need clearly outweighs the likelihood of inflaming the minds and passions of the jurors. Applying this weighing process to the facts of the instant case, we find that the trial judge abused his discretion by admitting the photographs. Here, we have clear felony murder case where the force used and the nature and extent of the injuries involved have no bearing on a finding of first degree felony murder. Moreover, assuming their relevance with respect to appellant's intent to commit grievous bodily harm, nowhere is it illustrated to our satisfaction that the pathologist could not have adequately and effectively testified without the use of these photographs. Whatever did these photographs may have been, their use was clearly outweighed by the emotional impact it would undoubtedly have on the jury. For this reason alone appellant is entitled to a new trial.
>
> "Judgment reversed and a new trial ordered."

In the instant case the color slides reproduced on pages 6500a through 6507a were exhibited to the Jury over the objection of Petitioner. It is submitted that no real argument is required to establish that the pictures shown to the Jury are the most horrible, gruesome, and inflammatory imaginable. The Record in the instant case clearly establishes, without the photographs, a horrible murder where victims

each sustained many grievous bullet wounds of the head. These facts were never in dispute. The Record further establishes that the Commonwealth pathologist adequately and effectively testified without the use of the photographs. It is therefore proper to ask why the use of photographs in the *Powell* case was clearly outweighed by the emotional impact it would undoubtedly have on the Jury, yet the use of similar photographs under similar circumstances in the instant case was held to be proper. It should be observed that in the instant case although the precise questions as were raised in the *Powell* case were in fact raised in the lower court and before the Supreme Court of Pennsylvania, the appellate court makes no mention of this subject in its opinion. The *Powell* decision came down on January 3, 1968. It was argued on November 22, 1967. At the very time that the *Powell* case was argued the petition for re-argument in the instant case was still pending before the Supreme Court of Pennsylvania. May a State court limit the application of a rule of law to only the case before it or must a rule dealing with such basic questions as fair trial and due process be applied for the benefit of all persons accused of crime?

(c) The third case in which the Supreme Court of Pennsylvania has stated a rule of law dealing with Federal constitutional rights which it has refused to apply to the precise facts in the instant case is *Commonwealth vs. Schmidt*, 423 Pa. 432 (1966). The Record clearly establishes that Petitioner was questioned in the absence of counsel and without being warned of his right to remain silent at a time when Petitioner was regarded by the police as a suspect. In the *Schmidt* case the Supreme Court held that *Escobedo vs. Illinois*, 378 U. S. 478 (1964), required a warning to a criminal suspect of the right to remain silent before police questioning in the absence of counsel. Thus, without giving any retroactive effect to *Miranda vs. Arizona*, 384 U. S. 436 (1966), the Supreme Court of Pennsylvania declared that in all cases tried subsequent to

Escobedo the statements or confessions of a criminal defendant are inadmissible if made in the absence of counsel or an effective warning of the right to remain silent. In the instant case, the Supreme Court of Pennsylvania, in its opinion, erroneously concluded that certain statements made by Petitioner were in fact voluntarily given to the police in the presence of counsel and it referred to unrelated statements in its opinion (see Appendix "A," p. 45). The Court was no doubt led into this error by reason of the argument of the Commonwealth as set forth in the written brief filed by it with the Court. Despite the fact that the petition for reargument clearly points out the erroneous factual conclusions set forth in the Supreme Court's opinion and clearly demonstrates by record references that very damaging statements were taken by the police in the absence of counsel and in the absence of any warning of the right to remain silent, the Supreme Court denied re-argument and thereby again refused to apply a rule of law clearly enunciated in another case for the equal protection of your Petitioner.

3. The instant petition raises three federal constitutional questions under the confrontation clause of the Sixth Amendment. All appear to be novel and not within the cases already decided by this Court:

(a) The first such question raised is whether the Fourteenth Amendment to the United States Constitution incorporates within its due process and equal protection clauses the provisions of the Sixth Amendment guaranteeing to a person accused of federal crime the right to compulsory process for obtaining witnesses in his favor. In the instant case Petitioner caused the issuance and service of subpoenas on the Police Commissioner of Philadelphia and the District Attorney of Philadelphia compelling their attendance on a day certain at the trial for the purpose of giving evidence concerning alleged phone calls made to and from a certain phone, which, information furnished to

Petitioner's counsel indicated, had been illegally intercepted by the police by the use of electronic wiretapping devices. The Trial Court, on motion of the Assistant District Attorney trying the case for the Commonwealth, suppressed the subpoenas. No hearing or other opportunity was afforded Petitioner to establish the right to enforcement of the process which had been properly issued and served. The question presented by the summary quashing of subpoenas merely because they are served upon public officials and seek the production of illegally obtained evidence is whether a constitutional right is to be denied a criminal defendant merely because enforcement thereof may require embarrassing disclosures by public officials. The Supreme Court of Pennsylvania in its opinion makes no mention of this point and completely ignores the argument that the quashing of the subpoenas was an erroneous ruling of the Trial Court.

(b) The facts which give rise to the preceding reason urged for granting the Writ, together with the facts shown in the Statement of the Case which relate to the deliberate withholding by the prosecution, with the concurrence of the Trial Court of evidence also present the question of whether fair trial and due process require the prosecutor to make available to the defense evidence and information which would be helpful to the defense. *Jencks vs. United States*, 353 U. S. 657 (1957); *Roviaro vs. United States*, 353 U. S. 53 (1957); and *Brady vs. Maryland*, 373 U. S. 83, (1963), indicate that where evidence favorable to an accused is requested and is withheld by the prosecution, due process is violated. Certain evidence in the instant case that may have been helpful to the accused was requested and the requests were denied. But just as important is that fact that other evidence, which could not be requested because its existence was unknown to the defense at the time of trial, was also withheld. The good faith of the Prosecutor in withholding this material is not raised. However, the failure to disclose is.

(c) During the three days that the major Commonwealth witness, Frank Phelan, was on the stand, he wore black glasses that completely concealed his eyes and other portions of his face. He refused to remove the glasses on request and the Court refused to direct him to remove them. *Douglas vs. Alabama*, 380 U. S. 415 (1965) and *Pointer vs. Texas*, 380 U. S. 400 (1965) hold that the confrontation clause of the Sixth Amendment is included within the constitutional rights guaranteed an accused by the Fourteenth Amendment. It is submitted that the lower court's rulings in refusing to direct the witness to remove the "mask" constituted a denial of the constitutionally guaranteed right of confrontation.

It is no answer to the denial of this right to say, as the Supreme Court of Pennsylvania in its opinion did, that because the Trial Court charged the Jury to take into consideration in evaluating the witness' testimony his refusal to remove the dark glasses, that Petitioner was not prejudiced.

In Appendix "G" to this Petition, a number of excerpts from the Record have, it is submitted, amply demonstrated other forceful reasons for the Supreme Court of the United States consideration of the entire confrontation question. Included in the excerpts are illustrations that demonstrate how the Court permitted a witness to direct the trial of the case in choosing and selecting those questions which he would or would not answer. The right of confrontation includes the right of a full and complete cross-examination. For the Trial Court to permit a witness to refuse to answer proper questions, not because the witness himself is asserting any constitutional privilege, but merely because the witness decides that the question is not relevant or merely because he simply will not answer the question, runs contrary to everything embodied within the constitutional right of confrontation. It is no valid reason for a court, robed in the majesty of law and justice, to say that it will not direct a witness to answer a proper question because such direction would be a "futile thing".

4. The instant case also raises several constitutional questions relating to the death penalty. This Court has never definitely answered all of these questions. The two questions raised in the Trial Court and before the Supreme Court of Pennsylvania were never considered by either Court in their opinions, although they were briefed and argued by Petitioner. In fact, none of the briefs of the Commonwealth even bothered to treat the questions. One question is: Does disqualification of jurors for scruples against capital punishment constitute denial of a fair trial on the issue of guilt? See Walter E. Oberer 39 *Texas Law Review* 545 (May, 1961), condensed in the April 6, 1964 issue of *The Nation*. The Oberer article makes the point that a jury of twelve individuals who have been selected from a larger number because they have no conscientious or religious impediments to decreeing death as punishment for crime are also psychologically and constitutionally predisposed to finding guilt to a much greater extent than would a jury composed of a normal cross-section of the community. This issue takes on added significance in the instant case when it is considered that 249 prospects were examined on the voir dire before it was possible to swear twelve jurors and two alternates for the actual trial. A substantial number of the 249 prospects called were rejected for cause on the ground that either the prospect had conscientious or religious scruples against the death penalty or that even though the juror could vote for the death penalty in the case of the actual murderer he would not vote for the death penalty in a case where the accused had not actually committed the murders but was charged with hiring someone else to do the actual killings. On January 15, 1968 this Court granted Certiorari in the case of *Witherspoon vs. Illinois*, (Miscellaneous Docket No. 344) on almost the precise point that was raised by Petitioner in the instant case. The only distinguishing feature is that in *Witherspoon vs. Illinois* there appears to be a state statute which permits challenge for cause of prospective jurors

opposed to or having conscientious scruples against capital punishment. In Pennsylvania there is no such statute but the law and practice recognize the right of the prosecution to challenge for cause on the same ground.

Also urged as a reason for granting the Writ in the instant case is the proposition that where both life imprisonment and the death penalty co-exist as punishment for the same crime, imposition of the death penalty violates the equal protection of the laws clause of the Fourteenth Amendment. Also, is the death penalty and particularly the penalty of death in the electric chair, a cruel and unusual punishment? This Court is being urged to consider these questions in the light of contemporary legal and social standards and is being asked to reconsider its earlier pronouncements relating to the subject matter contained in *Francis vs. Reswebber*, 329 U. S. 459 (1947), and in re *Kemmler*, 136 U. S. 436 (1890). The *Francis* case, under its peculiar facts decided by a vote of five to four that electrocution did not constitute a cruel and unusual punishment thereby making it unnecessary to decide whether this provision of the Eighth Amendment was incorporated within the due process clause of the Fourteenth Amendment. In view of the many recent decisions of this Court effectively incorporating the Bill of Rights into the Fourteenth Amendment as it relates to criminal prosecutions it would appear that the time has come for the Supreme Court of the United States to clearly state whether the cruel and unusual punishment provision of the Eighth Amendment is obligatory on the states and if it is, whether capital punishment violates this provision.

5. Another aspect of the adverse newspaper publicity relates to the severe limitations placed upon the Petitioner in the examination of prospective jurors. As shown in the statement of the case, Petitioner was prohibited by the Court from inquiring of any prospective juror as to whether the juror had formed any opinions concerning the guilt of Petitioner as a result of the publicity. The Trial Court

strictly limited inquiry to whether the prospective juror had a "fixed" opinion as to guilt or innocence. It is urged upon this Court that the principle of voir dire examination becomes meaningless, especially in a celebrated case, if the accused is not permitted to demonstrate by in-depth examination of the prospective juror the real impact of the pre-trial publicity on the prospective juror. This Court should determine whether due process includes the right to in-depth examination of prospective jurors on the effect of adverse pre-trial publicity or whether the accused is estopped to make further inquiry when the prospective juror states that he has not formed a "fixed opinion" as to guilt or innocence. A substantial portion of the opinion of the Supreme Court of Pennsylvania is devoted to Petitioner's complaints concerning the jury selection. However, nowhere in the opinion is there any discussion or ruling on the objections that pertain to the Trial Court's prohibition against asking prospective jurors who admitted knowledge of the case, the extent of such knowledge. Due process of law requires a trial by an impartial tribunal. This Court is asked to determine whether narrow restrictions severely limiting inquiries as to the tribunal's impartiality constitutes a denial of that due process and no better case than the instant one could exist as a vehicle for such determination.

6. The instant case presents a situation where a combination of an erroneous ruling by the Trial Court and a misapprehension of the facts by the appellate court have effectively denied Petitioner a substantial basic right which may now be lost forever because of the Trial Court's failure to rule properly at the time the question arose. Reference is made to a petition filed with the Trial Court after the verdict of the jury but prior to the entry of judgment and while the case was still within the control and jurisdiction of the Trial Court. As a result of proceedings in the companion case involving the witness Frank Phelan, which occurred subsequent to Petitioner's trial, Petitioner's counsel for the first time learned of certain facts which, if known

at the time of trial might have resulted in (a) a determination that this witness was not mentally competent to testify against Petitioner or (b) that the statements and testimony he gave against Petitioner were untrue. When Petitioner acquired this information it was formally brought to the attention of the Trial Court with a request that the Court fix a hearing to allow Petitioner to present the after-acquired evidence. The Trial Court summarily dismissed the Petition, entered judgment and sentenced Petitioner. The dismissal of the request was appealed to the Supreme Court of Pennsylvania which, likewise, on motion of the Commonwealth and again without hearing, questioned the appeal. The evidence available at the time of the filing of the petition included the testimony of Frank Phelan, who had informed Petitioner's counsel of his desire to testify in recantation of the testimony delivered at the trial and who had given to Petitioner's counsel statements supporting the recantation. It is doubtful that this testimony is still available today. It also included information concerning the mental condition of the witness as disclosed by the reports of a number of psychiatrists who had studied and examined the witness at the direction of the court and the prosecutor and the witness' counsel. None of this information was made available to Petitioner until after Petitioner's trial.

It is submitted that the manner in which the Trial Court summarily dismissed a timely application relating to the question of whether an accused sentenced to death was properly convicted constituted clear denial of due process.

Although the Supreme Court of Pennsylvania quashed the appeal taken on the Court's Order of dismissal of the petition, the question was raised again on the appeal of the judgments and sentences. In its opinion affirming the judgments, the Supreme Court of Pennsylvania concluded that the dismissal was proper because Petitioner failed to produce particulars of the allegations contained in the petition in response to a motion therefor by the Commonwealth.

The Supreme Court of Pennsylvania was in error on this point because it had been misled by errors contained in the Commonwealth's appellate brief. The Commonwealth's brief argued that Petitioner had failed to respond to the Commonwealth's motion for particulars in support of the allegations contained in the petition. The actual facts, concerning which there is no dispute whatsoever, are that the Trial Court dismissed and denied the petition without hearing *before* the Commonwealth filed and served its motion for particulars. Petitioner was at all times ready, willing and able to provide the particulars. In fact, that was the purpose of the petition requesting a hearing. As a result of the Trial Court's rulings, the appellate court's quashing of the appeal and the appellate court's misapprehension of the actual facts, Petitioner has been effectively shut-out by the passing of the very considerable period of time since the availability of the evidence. The factual error made by the Supreme Court of Pennsylvania was called to that Court's attention forthwith. A Petition for reargument to the Supreme Court was filed within ten days of the issuance of the opinion containing the erroneous factual conclusions. That petition for reargument, and the Commonwealth's answer thereto, which contains no denials, is included as Appendices "C" and "D" respectively to this petition.

The Supreme Court of Pennsylvania in its opinion, sets forth other erroneous factual conclusions which the Record clearly demonstrates. A major error of fact made by the appellate court is that Petitioner's counsel was present at the time very damaging statements were given to the police. It is conceded that at the time that the police interrogation occurred, Petitioner was not warned of his right to counsel or his right to remain silent or even told that what he said might be used against him. The Record also clearly demonstrates that at the time of interrogation Petitioner was a suspect. In fact, the record shows that at the time of the interrogation he was even restrained and in custody because he was in the hospital as a result of a serious bullet wound

sustained at the time of the murders. Yet, even though these facts are clearly established by the Record and were set forth with clarity in Petitioner's brief to the Supreme Court of Pennsylvania, which brief included complete citations to the Record, the Supreme Court of Pennsylvania concluded that the interrogation of the Petitioner took place in the presence of his counsel. Despite the fact that this erroneous conception of the actual facts was called to the attention of the Supreme Court of Pennsylvania by a timely and comprehensive petition for reargument (Appendix "C") the appellate court did nothing to remedy the error.

The question raised by the failure of the Supreme Court of Pennsylvania to rectify clear errors of fact upon which critical decisions are based, is whether a state court may avoid constitutional mandates of the United States Supreme Court by a misstatement of facts, even though such misstatements are inadvertent rather than deliberate.

Conclusion

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

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Of Counsel:
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APPENDIX "A"

Opinion of the Supreme Court of Pennsylvania

OPINION BY MR. JUSTICE EAGEN, September 26, 1967:

Judith Lopinson and Joseph Malito were shot to death in the basement office of Dante's Restaurant in the City of Philadelphia about 3:30 o'clock a.m. on June 19, 1964. Dante's, at that time, was operated by Jack Lopinson, husband of Judith, and Malito under a partnesrhip arrangement.

On July 15, 1964, following the conclusion of a three-day inquest conducted by the medical examiner of Philadelphia, Jack Lopinson was charged with the murders and held for action by the grand jury. He was indicted the same day. Subsequently, Frank Phelan was arrested and also indicted for the murders.

On October 26, 1964, Phelan plead guilty to the indictments, and later, following a hearing before the court of Oyer and Terminer of Philadelphia County, was adjudged guilty of murder in the first degree and sentenced to death in each case. We have this day affirmed the judgments. See *Commonwealth v. Phelan*, 427 Pa. 266, A. 2d (1967).

Lopinson plead not guilty and elected to go to trial before a jury. On March 4, 1965, after trial, he too, was found guilty of murder in the first degree in each case and the penalty was fixed at death. Following dismissal of motions for a new trial and in arrest of the judgments by the court en banc, sentences were imposed by the trial judge in accordance with the jury's verdict. These appeals followed.

In accordance with our statutory duty,[1] we have studied the record and it fully supports the convictions and sentences.

The trial evidence was more than ample to establish these facts:

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[1] Act of February 15, 1870, P. L. 15, §2, 19 P.S. §1187.

Lopinson requested Phelan to kill both his wife and Malito, to which Phelan agreed; Lopinson drove Phelan in his automobile to Delaware to secure the murder guns for which Lopinson paid the purchase price; the time and place for the commission of the killings were suggested by Lopinson; originally the crimes were planned for two nights prior but at the last minute were deferred; a few hours before the killings, Phelan and Lopinson discussed and finalized the plans in the former's automobile; at Lopinson's suggestion Phelan entered the basement of the restaurant through a rear cellar door and secreted himself, while waiting for Judith Lopinson and Malito to come from the first floor of the restaurant after it closed to the basement office to count the day's receipts; upon their arrival Phelan entered the office with a gun in each hand and summarily shot each victim in the head twice; after Phelan went upstairs and reported the shootings to Lopinson, together they returned to the office and, upon discovering that death had not yet taken its toll Phelan at the request of and in the presence of Lopinson, fired additional bullets into the heads of the victims. The two then returned upstairs and discussed the explanation previously agreed upon that Lopinson would give the police, namely, that the restaurant had been held up by two unknown men who had fatally shot Judith Lopinson and Malito, and also shot Lopinson. To fortify this story, Phelan, with consent, then shot Lopinson through the fatty tissue of his thigh, and after Phelan left the premises Lopinson fired a bullet from his own gun into a wall of the restaurant. When the police arrived, Lopinson told them the concocted story about the restaurant being robbed.[2]

From the evidence the jury could also find that Lopinson wanted to get rid of his wife for another woman, his mistress; and killing Malito would help solve his financial troubles and render the false robbery story by two unknown intruders more plausible.

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[2] At trial Lopinson admitted he gave this story to the police and that it was a lie.

Lopinson's excellent counsel (court appointed) challenge the validity of the judgments on a multitude of grounds. It is asserted that a substantial number of rulings in the court below were erroneous, and while "many of the rulings taken separately may not constitute harmful error," the end result was to deny Lopinson a fair trial.

We shall discuss a major portion of the assignments of error in detail.

Denial of a Preliminary Hearing

Following the conclusion of an inquest conducted by the medical examiner of the City of Philadelphia, Lopinson was held for action by the grand jury without the usual procedure of a hearing before a magistrate or a justice of the peace. This did not void the subsequent judgments.

The Philadelphia medical examiner possesses all of the powers of a coroner by virtue of the provisions of the Philadelphia Home Rule Charter, including jurisdiction to conduct an inquest when sudden, violent or unnatural deaths occur, and to act as a committing magistrate if the deaths are found to be the result of homicide. As correctly stated by the court below: "It has been the law in England and Pennsylvania, at least since 4 Edward 1 Statute 2 (A.D. 1276), that the Coroner has imposed upon him the duty 'to use prompt measures for apprehending persons so charged' (with responsibility for sudden death &c. of another) . . . 'for which purpose he may direct his warrant to the Sheriff for arresting and securing them.'

"3. Henry VII Cap. 1 (A.D. 1486) states, 'The coroner (is). . . the proper officer to take inquisitions *super visum corporis.*'

"Both of the above statutes of England are the law in Pennsylvania. *Digest of Select British Statutes in Force in Pennsylvania*, by Roberts (1847) p. 106, and XXI, XXXIV ('a coroner's duty after a murder committed').

"The Philadelphia Code of *Ordinances*, 2-102, enacted under authority of the Philadelphia Home Rule Charter,

transfers all powers and duties of the Coroner to a Medical Examiner, particularly those 'relating to the investigation of sudden violent and suspicious deaths and the determination of whether the person or persons responsible shall be charged with crime.'

"If the Coroner (here the Medical Examiner) finds a person responsible for a homicide, it is his duty to commit that person, without bail. Power of Coroner &c., 11 Phila. 387 (1875); Rentschler v. Schuylkill County, 1 Schuylkill Legal Record 289 (1880). When the Coroner returns his inquisition, an indictment may be found against the person charged. Com. v. Lafferty, 11 C.C. 513 (1892). See also Com. ex rel. Bandi v. Ashe, 367 Pa. 234 (1951); Marvin v. Monroe County, 154 Pa. Super. 75, 78 (1943)." See also, *Commonwealth ex rel. Tanner v. Ashe*, 365 Pa. 419, 76 A. 2d 210 (1950).

Refusal of Motion To Quash the Indictments

On the very same day he was arrested, Lopinson was indicted by a grand jury which had already been in session for a two-week period. Lopinson had no prior notice of the presentment of the bills to the grand jury, and it is argued he was completely denied the opportunity of investigating and challenging any member of the grand jury for cause or of challenging the array. A pretrial motion to quash the indictments on this ground was overruled below after hearing.

If Lopinson were denied all opportunity of entering a proper challenge to the grand jury or a member thereof, this would constitute a denial of due process of law and the indictments should have been quashed. See *Commonwealth v. Dessus*, 423 Pa. 177, 224 A. 2d 188 (1966). But such is not so.

As of the date Lopinson was indicted (July 15, 1964) under Pennsylvania law then controlling, a challenge to the grand jury could be entered *either before or after* an indict-

ment was returned; the only time limitation was that it be entered before the plea in court. See *Commonwealth v. Weiner*, 101 Pa. Superior Ct. 295 (1930); *Commonwealth v. Magid & Dickstein*, 91 Pa. Superior Ct. 513 (1927); and, 17 P.L.E., Grand Jury §4. However, when such a challenge was entered, the burden was upon the complaining party to establish the facts to support the challenge. See *Commonwealth v. Williams*, 149 Pa. 54, 24 A. 158 (1892); *Rolland v. Commonwealth*, 82 Pa. 306, 22 Am. Rep. 758 (1876); *Commonwealth v. Haines*, 57 Pa. Superior Ct. 616 (1914); and, *Commonwealth v. Carlucci*, 48 Pa. Superior Ct. 72 (1911).

When Lopinson filed the motion to quash the indictments here, the lower court fixed a time for hearing and afforded him the opportunity of producing any pertinent fact desired. Nothing was produced to show that the grand jury was illegally impaneled, or any member thereof was unqualified to sit. Hence, Lopinson was given full opportunity to enter a proper challenge to the grand jury, but since he failed to meet his burden of proof the challenge and the motion to quash were properly overruled.

Commonwealth v. Dessus, supra, relied upon by Lopinson is inapposite. Dessus was indicted *after* the effective date (January 1, 1965) of Rule 203 of the Pennsylvania Rules of Criminal Procedure, and was, therefore, subject thereto. Under this Rule, a challenge to the grand jury must be made "before the [grand] jurors are sworn unless opportunity did not exist prior thereto; *in any event a challenge must be made before the bill of indictment is submitted to the grand jury. . . .*" (Emphasis added.) Since Dessus was arrested and indicted on the same day and could not under Rule 203, then controlling, enter a challenge after the indictment was returned, he was completely and effectively deprived of his rights in this regard. Again, this is not the case here.

Refusal To Grant a Continuance

Because of the nature of the crimes and the surrounding circumstances, the case provoked extensive publicity in the Philadelphia newspapers immediately following the occurrence, when the arrests were made, and at the time of trial. Pretrial and during the period of voir dire examination of the prospective jurors, Lopinson moved the court for a continuance on the ground that the extent and nature of the publicity rendered it impossible to secure a jury in the case free from bias and prejudice. These motions were overruled.

There can be no question but that Lopinson was entitled to be tried by a tribunal free from prejudice, passion and bias: *Sheppard v. Maxwell*, 384 U.S. 333 (1966); and *Chambers v. Florida*, 309 U.S. 227 (1940). In short, he was entitled to a fair trial and this required that the jury's conclusions be induced only by evidence and argument in open court and not by outside influences. See *Patterson v. Colorado*, 205 U.S. 454 (1907).

While there is no claim made here that any particular petit juror was biased, it is urged that, in view of the publicity, any jury selected in Philadelphia at the time must be held to be presumptively biased. Of course, if Lopinson did in fact receive a fair trial by an impartial jury, this contention is devoid of merit. See *Beck v. Washington*, 369 U.S. 541 (1962). We now turn our attention to that inquiry.

The murders occurred on June 19, 1964, and the arrests on July 15th. In October 1964, Lopinson filed a motion for a change of venue, because of prejudicial publicity, to which the Commonwealth filed an answer denying that the publicity had the effect alleged, but voicing no objection to the request. Shortly thereafter, Lopinson's motion was voluntarily withdrawn.

The trial began on January 19, 1965, seven months after the murders were committed and more than six months after the arrests. Voir dire examination of the pros-

pective jurors began immediately, and a total of 250 individuals were examined before twelve jurors and two alternates were chosen. As each juror was selected, he or she was immediately sequestered and remained so until the verdict was recorded.[3] The fourteenth juror, or second alternate, was accepted on January 28th.

Extensive voir dire examination was permitted and challenges for cause were liberally allowed. Two of the jurors selected for the trial had read nothing about the case; two others were not asked by counsel during the examination if any reading thereof took place; several had read news accounts of the case only "slightly" or superficially; and, none had engaged in an extensive or intensive reading of the news articles pertaining thereto. Each juror selected unequivocally indicated he was free from bias, had not formed any opinion and would enter the trial with an open mind, free from the influence of anything he might possibly have read or heard in connection with the case. Not one of the jurors selected was challenged for cause and there is nothing in the record to indicate that any such cause did exist. Under such circumstances, it is our view that a fair and impartial jury tried the case and we certainly do not feel compelled to find, as a matter of law, that bias or preformed opinion invaded the jury box and influenced the verdict. The contention that an unfair trial resulted on this basis is bottomed on pure speculation. One who claims such an injustice must rely on more than mere guess. Cf. *Beck v. Washington*, supra; *Irvin v. Dowd*, 366 U.S. 717 (1961); and, *United States ex rel. Darcy v. Handy*, 351 U.S. 454 (1956).

Voir Dire Examination of Jurors

During the voir dire examination of the prospective jurors, the court permitted inquiry concerning their having

[3] The two alternates were discharged from further duty upon submission of the case to the jury.

any conscientious scruples against the imposition of the death penalty in a proper case, and particularly where the proof established the accused did not commit the actual killing, but arranged for someone else to do it for him. If such conscientious scruples existed, a challenge for cause was sustained. This was not error.

Identical questions were asked of jurors in *Commonwealth v. Bentley*, 287 Pa. 539, 135 A. 310 (1926), and approved by this Court. See also, *Commonwealth v. Gelfi*, 282 Pa. 434, 128 A. 77 (1925); and, *Commonwealth v. Henderson*, 242 Pa. 372, 89 A. 567 (1913).

As stated in *Commonwealth v. Bentley*, supra, at 546; 135 A. at 313: "In conducting the preliminary examination, considerable latitude must be permitted to elicit the necessary information, but it is to be strictly confined to inquiries disclosing qualifications, or lack of them, and not extended so as to include hypothetical questions, when their evident purpose is to have the jurors indicate in advance what their decisions will be under a certain state of the evidence or upon a certain state of the facts, and thus possibly commit them to definite ideas or views when the case shall be finally submitted to them for their decision. The purpose of the examination in the present case was not to obtain information as to the verdict which the juror would render upon the production of certain evidence, but whether he could consistently render a verdict such as the law contemplated, if the testimony established guilt beyond a reasonable doubt."

Lopinson also contends that the scope of his voir dire examination of the prospective jurors was unduly limited. An examination of the record disclosing the extent of the examination allowed completely refutes this position. Moreover, it is manifestly premised upon the mistaken belief that the purpose of the voir dire examination is to provide a defendant with a better basis upon which to utilize his

peremptory challenges.[4] This is not so. As stated by President Judge RICE in *Commonwealth v. Brown*, 23 Pa. Superior Ct. 470, at 498 (1903): "[T]he right of peremptory challenge is not of itself a right to select but a right to reject jurors." Accord *Commonwealth v. McGrew*, 375 Pa. 518, 525, 100 A. 2d 467, 470 (1953); and *Commonwealth v. Morgan*, 280 Pa. 67, 71, 124 A. 339, 340 (1924).

It is further stated in *Commonwealth v. McGrew, ibid.*, that: "The examination of jurors under voir dire is solely for the purpose of securing a competent, fair, impartial and unprejudiced jury: . . . Neither counsel for the defendant nor for the Commonwealth should be permitted to elicit any information of this nature, or to ask direct or hypothetical questions designed to disclose what a juror's present impression or opinion may be or what his attitude or decision will likely be under certain facts which may be developed in the trial of the case. While considerable latitude should be permitted on a voir dire, the inquiry should be strictly confined to disclosing qualifications or lack of qualifications of a juror and whether a juror has formed a fixed opinion or may be otherwise subject to disqualification for cause. . . .

"It is also well settled that the scope of the voir dire examination rests in the sound discretion of the trial Judge and his decisions, even in a challenge for cause, will not be reversed in the absence of palpable error."

Lopinson also challenges the correctness of the court's rulings sustaining challenges to certain questions asked of the possible jurors. The rulings were correct.

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[4] In appellant's brief, the following appears in this connection: "Jury selection and voir dire examination is not limited merely to eliciting facts that would constitute the basis for challenge and cause. The voir dire is the only real opportunity the defendant has to learn something of the background and nature of the prospective juror. Even where proper cause for challenge may not exist the defendant is required to decide whether he will allow the prospect to serve or will dismiss the prospect by the exercise of a peremptory challenge."

In one instance the question sought to learn if the proposed juror had formed "any opinion . . . regarding the statement of any person connected with the case or with regard to any material fact of the case." The only legitimate inquiry in this area was whether or not the juror had formed a fixed opinion in the case as to the accused's guilt or innocence. See *Commonwealth ex rel. Ryan v. Rundle*, 411 Pa. 613, 192 A. 2d 362 (1963), cert. denied, 375 U.S. 948 (1963).

Other questions in this category sought to examine the prospective juror upon his understanding and acceptance of certain principles of law. This was improper examination: *Commonwealth v. Calhoun*, 238 Pa. 474, 86 A. 472 (1913).

Still other questions sought to discover the jurors' potential reactions if the defendant did not take the stand or produce other evidence. Again, such questions were wholly unwarranted and properly excluded. See *Commonwealth v. Wireback*, 190 Pa. 138, 42 A. 542 (1899).

Trial Rulings

A Philadelphia police officer received a radio call reporting a shooting at Dante's Restaurant and in company with another officer went immediately to the scene. In the basement office, he found the dead bodies of the victims and Lopinson sitting on a chair behind a desk. At trial, the officer described what he saw and the conversation he had with Lopinson at this time, including the latter's explanation of how the restaurant had been held up by two unknown men, who had shot the victims during the robbery. Since Lopinson was without counsel at the time and not forewarned of his right to remain silent, it is urged that the use of this evidence at trial was constitutionally proscribed. We cannot agree.

Apart from the fact that the instant trial took place before the effective date of *Miranda v. Arizona*, 384 U.S. 436 (1966), the situation involved was not such as required the police officer to stop and warn Lopinson of his constitutional rights. As of the time involved Lopinson was not in custody, or even a suspect. Further, the officer was merely engaged in a general investigation and an "on the scene" questioning as to what happened. His testimony as to Lopinson's statements under these circumstances, even in the absence of a warning of constitutional rights, was clearly admissible. See *Miranda v. Arizona*, supra; *Commonwealth v. Eperjesi*, 423 Pa. 455, 224 A. 2d 216 (1966); and, *Commonwealth v. Jefferson*, 423 Pa. 541, 226 A. 2d 765 (1966).

Following the homicides and while Lopinson was in a hospital being treated for the bullet wound, he was interviewed by investigating officers who were seeking to ascertain a description of the two alleged hold-up men. Lopinson's then self-retained counsel was present at all times during this questioning and the record clearly proves that Lopinson's statements were truly volunteered, and not the result of any conduct in violation of his constitutional rights.

Phelan appeared as a Commonwealth witness and testified he committed the killings at the request of and in concert with Lopinson. It is argued that the trial judge unfairly restricted counsel's cross-examination of Phelan, the actual killer and Lopinson's co-conspirator. Our reading and re-reading of the pertinent portion of the record fails to sustain the contention.

Phelan was examined for the better part of three days. His direct examination covers forty-one pages of the printed record, and his cross-examination covers five hundred and four pages. While a superficial consideration of some few trial rulings cited in Lopinson's brief might lead one to conclude that legitimate inquiry was denied, a reading of Phelan's entire testimony immediately dispels any such thinking.

It is certainly true that cross-examination is a vital and fundamental part of a fair trial. Full cross-examination of a witness upon the substance of his direct testimony is an absolute right, the denial of which is error of constitutional dimensions. See *Pointer v. Texas*, 380 U.S. 400 (1965), and *Alford v. United States*, 282 U.S. 687 (1931). Moreover, the right of cross-examination extends beyond the subjects testified to in direct testimony and includes the right to examine on any facts tending to refute "inferences or deductions" arising from matters testified to on direct. See *Conley v. Mervis*, 324 Pa. 577, 188 A. 350, 108 A.L.R. 160 (1936).[5] And in cross-examination of an accomplice, such as Phelan, very wide latitude should be permitted. See *Douglas v. Alabama*, 380 U.S. 415 (1965); *Snyder v. Massachusetts*, 291 U.S. 97 (1934); *Commonwealth v. Russo*, 388 Pa. 462, 131 A. 2d 83 (1957); *Commonwealth v. Prophet*, 307 Pa. 122, 160 A. 597 (1932); and, *Commonwealth v. Gable*, 171 Pa. Superior Ct. 468, 90 A. 2d 301 (1952). Again, our study of Phelan's testimony compels the conclusion that a searching, exhaustive and repetitive cross-examination of Phelan was permitted and if a few erroneous rulings were made during the progress thereof, no prejudicial harm resulted. Phelan's version of the conspiracy and killings, his prior relevant statements in regard thereto, his vicious personal makeup and past activities were all the subject of extensive examination and fully exposed for the jury's consideration. In short, the opportunity of placing Phelan in his proper setting before the jury and putting the

[5] While certain decisional points in the *Conley* case relating to procedure have been criticized and overruled, *Kline v. Kachmar*, 360 Pa. 396, 402 at n. 2, 61 A. 2d 825, 829 at n. 2 (1948), the vitality of the substantive proposition for which *Conley* is here cited was untouched by *Kline* and has not been subsequently questioned. See *Parent v. Dickinson*, 391 Pa. 162, 165, 137 A. 2d 788, 789 (1958); *King v. Holt*, 200 Pa. Superior Ct. 431, 435, 188 A. 2d 760, 762 (1963). Cf. *Miller v. Pennsylvania R. R. Co.*, 371 Pa. 308, 327, 89 A. 2d 809, 817 (1952) (STERN, J., dissenting).

weight and credibility of his testimony to an adequate test was not denied.

During one of the trial recesses, Phelan, in the absence of the trial judge and the jury, allegedly made a vulgar remark manifesting intense hatred for those of the Jewish religion.[6] During cross-examination, counsel asked Phelan if his testimony against Lopinson was "based on his hatred of his (Lopinson's) religion", to which Phelan replied, "No. I like Jack Lopinson." In answer to another inquiry, he categorically denied making the statement attributed to him. Additionally, his personal feelings for Lopinson before and after the killings were carefully explored. The trial judge refused to permit inquiry as to Phelan's possible prejudice and bias towards the Jewish people generally, and sustained an objection by Commonwealth's counsel to a specific question seeking to ascertain just what Phelan did say during the recess involved. While the last mentioned ruling appears to be too restrictive in view of the examination theretofore permitted, we do not consider it to constitute prejudicial error.

During his cross-examination, Phelan manifested belligerency and refused to answer a few questions. Lopinson's request to have the court direct him to answer or to strike all of his testimony from the record was denied. This is assigned as error, because it is asserted the questions were proper inquiry in an attack on his credibility.

These questions involved the circumstances incident to Phelan's arrest and subsequent treatment by the police, and whether or not he was coerced into confessing and testifying against Lopinson; his test firings of the guns, following the purchase thereof before the killings; his use of drugs, particularly during the days immediately before the commission of the crimes; and, his admitted desire and urge to kill.

[6] Commonwealth's counsel, who was nearby, admitted the utterance of a vulgar remark by Phelan directed towards Lopinson's counsel, but denied anything was said about the Jewish people.

A trial court should not permit a witness to decide what questions he will answer. This is the court's sole prerogative, and it has been held in some jurisdictions that if a trial judge deems it necessary to sustain a witness's refusal to answer certain relevant questions to protect him from incriminating himself, then his whole testimony on the subject involved should be stricken. See *People v. Cole*, 43 N.Y. 508 (1871); *McRae v. Boykin*, 50 Ga. App. 866, 179 S.E. 535, 541-542 (1935), reversed on other grounds, 182 Ga. 252, 185 S.E. 246 (1936); and *People v. McGowan*, 80 Cal. App. 293, 251 Pac. 643, 645-646 (1926).

However, what Lopinson overlooks in connection with this particular assignment of error is the fact that the questions involved here were in most part answered, and the information sought was elicited through subsequent portions of his cross-examination. The incidents complained of showing Phelan's reticence are taken out of context and fail to take into account his entire testimony. Only two facts, sought to be gained in the questions involved, remained undisclosed at the close of his cross-examination, (1) where he purchased the dope pills which he admittedly used frequently, and, (2) the specific location of the test firings of the murder weapons. Under these circumstances the trial judge properly refused to strike his testimony from the record, and Lopinson's right to cross-examine was not constitutionally impinged upon. See *United States v. Cardillo*, 316 F. 2d 606 (2d Cir. 1963); *United States v. Toner*, 173 F. 2d 140 (3d Cir. 1949); *Stephan v. United States*, 133 F. 2d 87 (6th Cir. 1943), cert. denied, 318 U.S. 781 (1943); and, *United States v. Johnson*, 129 F. 2d 954 (3d Cir. 1942), aff'd, 318 U.S. 189 (1943).

Lopinson's final complaint about Phelan's testimony is the refusal of the trial judge to order him to remove a pair of sunglasses which he wore throughout his testimony in chief. (While testifying as a rebuttal witness he did appear without the sunglasses.) It is argued that this

circumvented the jury's right to properly observe his demeanor on the stand.

There is no question but that a witness's appearance and demeanor is an important consideration for the jury in assessing his credibility. As stated by Chief Justice APPLETON in his treatise on evidence, at page 220: "The witness present, the promptness and unpremeditatedness of his answers or the reverse, their distinctness and particularity or the want of these essentials, their incorrectness in generals or particulars, their directness or evasiveness, are soon detected. . . . The appearance and manner, the voice, the gestures, the readiness and promptness of the answers, the evasions, the reluctance, the silence, the contumacious silence, the contradictions, the explanations, the intelligence or the want of intelligence of the witness, the passions which move or control—fear, love, hate, envy, or revenge—are all open to observation, noted and weighed by the jury." Quoted in 5 Wigmore, Evidence §1395, at p. 126 (3d ed. 1940). See also, *Danovitz v. Portnoy*, 399 Pa. 599, 605, 161 A. 2d 146, 149 (1960); *High v. Berret*, 148 Pa. 261, 264, 23 A. 1004 (1892); and, *Robinson v. Robinson*, 183 Pa. Superior Ct. 574, 575, 133 A. 2d 259, 260 (1957).

The fact that Phelan refused to remove the sunglasses during his appearance as a witness in chief was repeatedly brought to the attention of the jury by Lopinson's counsel, and, undoubtedly, was more helpful than harmful to his case.

In addition, at the very conclusion of the charge, the court specifically instructed the jury to consider the use of the dark glasses and Phelan's refusal to take them off as bearing on his credibility. The very last instruction given to the jury, in a supplement to the main body of the charge was: "And, secondly, I want to charge you in a matter that I had intended to during my charge relating to the wearing of dark glasses by one of the witnesses, Frank Phelan, and an evidence by him of a refusal to remove his

glasses while he was being examined on his first appearance in court.

"When he appeared as a rebuttal witness, you will recall he was not wearing dark glasses.

"I charged you relating to credibility or believability of witnesses, such as their interest in the outcome of a case, their apparent intelligence, and their ability to observe clearly and relate accurately what they observed, and other facets of determining believability of a witness.

"Now, the fact that Phelan refused to remove his glasses is one of the numerous factors which you should consider in connection with your judgment as to whether or not he was telling the truth, weighing their credibility or believability by every means that you have at your disposal as intelligent individuals, but particularly I wanted to relate to you concerning the dark glasses, that it's one of the numerous factors to be considered when you weigh the credibility of that particular witness."

Following the conclusion of Phelan's testimony, Lopinson's counsel requested the court to have a psychiatrist examine the witness.[7] It was asserted that the nature of his testimony was such as to raise serious doubts as to his competency. The motion was refused.

No authority has been called to our attention stating the court is compelled to have a witness psychiatrically examined at the request of a defendant, and it has been decided in a recent case that no such right on the part of the defendant exists. See *People v. Nash*, 36 Ill. 2d 275, 222 N.E. 2d 473 (1966). Regardless, the facts herein clearly support the court's ruling on the questions.

Long before trial Phelan had been examined by psychiatrists retained by the Commonwealth and also by his previous counsel, Mr. Walsh. Lopinson's trial counsel were fully aware of this before trial and had interviewed at

[7] A similar request had been made pretrial which was refused without prejudice to renew it subsequently if sufficient cause appeared.

least one of the psychiatrists involved concerning Phelan's condition. The testimony of any or all of these specialists as to any facts disclosed or conclusions reached as a result of their examinations of Phelan was available to the defense through subpoena. They did not seek to pursue it. In view of this and the fact that the court had full opportunity to hear and observe Phelan throughout his appearance on the stand, we find no abuse of discretion on its part in refusing to order an additional examination.

Lopinson complains that the court permitted the Commonwealth to introduce prejudicial hearsay testimony at trial.

For instance, during Phelan's cross-examination, Lopinson's counsel elicited answers saying Phelan had told the victim, Malito, several days before the commission of the crimes that he had a contract to kill him. Phelan was thoroughly examined concerning the details of this conversation, throughout which Lopinson's counsel sought to ridicule the testimony and the fact that any such conversation occurred. Phelan then suggested that perhaps Malito had told someone about it and, if so, it could be verified. At trial the Commonwealth was permitted to introduce the testimony of Pasquale Malito, a son of the victim Malito, who stated his father had told him about such a conversation with Phelan on the same day Phelan had testified the colloquy occurred (i.e., the Sunday before the murders).

Under this setting the testimony was admissible for the purpose of proving the statement was made. See *Commonwealth v. Ricci*, 332 Pa. 540, 544-545, 3 A. 2d 404, 406 (1939).

Another example of testimony challenged on the ground of hearsay came into the case in this way.

Malito had entered the Dante partnership arrangement about two months before his death, and Lopinson was permitted great latitude at trial in testifying about the business transaction and his conversations with Malito in regard thereto. In part, he stated that Malito agreed to pay

him $15,000 for a share in the business, later changed the offer to $5000, and as of the time of his death had paid only $3500.

In rebuttal, the Commonwealth was permitted to introduce the testimony of members of Malito's family who told of conversations with Malito before his death, which tended to refute this portion of Lopinson's testimony and establish that Malito had actually paid him the $15,000 agreed upon and was not in debt to him, as Lopinson claimed.

Assuming arguendo, that the testimony was proper rebuttal, we agree that it should not have been admitted. It was pure hearsay, and we are not persuaded that it constituted a valid exception to the hearsay rule.[8] However, in view of all the testimony in the case, we are convinced it had no influence on the verdict, even though the Commonwealth did refer to it vigorously, but briefly, in its summation. It was, therefore, harmless error. See *Commonwealth v. Thomas*, 410 Pa. 160, 189 A. 2d 255 (1963), cert. denied, 375 U.S. 856 (1963); *Commonwealth v. Daily*, 280 Pa. 59, 124 A. 440 (1924); and, *Commonwealth v. Curcio*, 218 Pa. 327, 67 A. 643 (1907). Some error in a protracted trial, such as this, will unfortunately occur, but we have consistently ruled that if the error did not deprive the defendant of the fundamentals of a fair trial, we will not reverse the conviction. See *Commonwealth v. Thomas*, supra, and *Commonwealth v. Barnak*, 357 Pa. 391, 54 A. 2d 865 (1947).

At the medical examiner's inquest, Sidney Cardonick testified about two conversations he had with his friend, Lopinson, within months of the occurrence involved herein: (1) wherein Lopinson expressed a wish "to get rid" of his

[8] The lower court admitted the evidence to show the state of mind of Malito and his intention as to his business transaction with Lopinson under an exception to the hearsay rule, recognized in *Commonwealth v. Marshall*, 287 Pa. 512, 135 A. 301 (1926), and *Commonwealth v. Wilson*, 394 Pa. 588, 148 A. 2d 234 (1959), cert. denied, 361 U.S. 844 (1959).

wife; and, (2) during which Lopinson bought some guns from the witness and said "if you ever want to get rid of anybody, let me know. I know a hit man for $300."

During the period between the inquest and trial, Cardonick visited the office of Lopinson's counsel and told them his testimony at the inquest about these conversations was not true, and was instigated by and the result of threats made by an assistant district attorney. This interview was tape recorded.

At trial Cardonick repeated his testimony, as given at the inquest, and, despite vigorous cross-examination, insisted it was true. He acknowledged making the inconsistent statements, mentioned before, to Lopinson's counsel.

A verbatim typewritten transcript of the tape recording was read to the witness by Lopinson's counsel, and he admitted it was accurate and everything therein recorded occurred. However, the trial court refused to permit a playing of the tape itself in the presence of the jury. This is assigned as error on the ground that the ruling denied Lopinson the impeachment weight and significance of the recording itself.

". . . [T]ape recordings are admissible in evidence when they are properly identified and are a true and correct reproduction of the statements made, and when the voices are properly identified:" *Commonwealth v. Bolish*, 381 Pa. 500, 524, 113 A. 2d 464, 477 (1955). See also *Commonwealth v. Hart*, 403 Pa. 652, 660, 170 A. 2d 850, 854-855 (1961); cert. denied, 368 U.S. 881 (1961). And where a witness has made a statement inconsistent with his trial testimony, the agrieved party has the right to introduce in evidence the entire statement for the purpose of impeachment. See 3 Wigmore, Evidence §1037, page 723 (3d ed. 1940). However, the entire contents of Cardonick's statement was given to the jury. That it was complete and accurate was unquestioned. We are not persuaded that the denial of the opportunity to repeat the contents of the contradictory statement to the jury, through the use of the tape recording, impinged upon Lopinson's right of impeachment.

Lopinson personally testified at trial. Also several witnesses called by the defense were asked about his reputation for being a law-abiding citizen. While some limited their answers to "good" or "excellent", one embellished it by stating: "Everybody who knows Jack Lopinson thinks he is a wonderful person, a good honest person. That if you need a friend he was there."

In rebuttal, the Commonwealth called witnesses who were asked, after being qualified: "Among the people who knew him what was his reputation for truthfulness?" One such witness, David Seflin, the father of Judith Lopinson, replied: I will have to clean that up a bit to make it acceptable to the ladies in the court room. . . . He is an unmitigated liar and scoundrel." Another such witness, Milton Jacobs, answered the question thusly: "Not truthful, a very bad liar."

Lopinson contends it was error to allow any testimony as to his reputation, and in any event the answers of Seflin and Jacobs, related above, were unresponsive, should have been stricken from the record and the jury instructed to disregard them.

Since Lopinson placed his own credibility in issue by testifying, and his general reputation in issue by other witnesses, it was perfectly proper for the Commonwealth to impeach his credibility by competent evidence showing that his general reputation for truthfulness in the "neighborhood" where he lived and was known was bad. See *Commonwealth v. Harvie*, 345 Pa. 516, 28 A. 2d 926 (1942), and *Commonwealth v. White*, 271 Pa. 584, 115 A. 870 (1922). The answers to the questions submitted should have been limited to his general reputation for truthfulness in the community, but the failure of the trial judge to so rule is not of such moment as to require a new trial. This is particularly true in view of the embellishments, noted before, on the part of one character witness called by the defense. See *Commonwealth v. Palmer*, 184 Pa. Superior Ct. 171, 132 A. 2d 889 (1957).

The Charge to the Jury

Lopinson urges that in his charge to the jury the trial judge, while not expressing any clear-cut opinion of defendant's guilt, did by "inference . . . . let the jury know that in its opinion the defendant was guilty of first degree murder." Our reading of the charge discloses no such indication therein. The charge was completely fair and repeatedly admonished the jury that the question of guilt or innocence and the degree of guilt, if any, was for its decision alone.

Other asserted complaints about the charge are likewise devoid of merit. Instructions to a jury must be read and considered in their entirety. See *Commonwealth v. Whiting*, 409 Pa. 492, 187 A. 2d 563 (1963). When so read and considered, the instructions in the instant case were thorough, clear, impartial and free from error.

Particular complaint is voiced as to the court's instructions on the penalty to be imposed. It is urged that they "constituted a mandatory injunction to the jury to bring back the verdict of death." Again sentences therein, taken out of context, are emphasized. The nature of the penalty to be imposed was left to the sole discretion of the jury, as an objective reading of the entire charge in pertinent part will disclose. The jury was correctly instructed in part as follows: "You should consider carefully the character of this defendant, his background, his previous behavior, how he has impressed you as an individual and as a person. And you must give more weight to the character of the individual as you understand it than to the character of the crime in this particular instance for which he stands convicted.

. . .

"You should not decide upon the sentence out of any feeling of vengeance. You may consider the age of the defendant as well as other characteristics about him.

"The death sentence should not be imposed unless you come to the conclusion that it is the proper sentence after careful consideration of the defendant as an individual, his character and background, and unless you believe that it is justified on the basis of the criminal acts for which you have found him guilty of murder in the first degree."

Dismissal of Post-Trial Petition for Leave To File Supplemental Reasons in Support of Motion for New Trial and in Arrest of Judgment

The verdict of the jury was returned on March 4, 1965. The motions for a new trial and in arrest of judgment were filed on March 5th. They recited only the usual pro forma reasons in support thereof, but permission was granted to file additional assignments of error after the transcript of the record was filed. When this was effected, fifty-seven additional reasons in support of the motion for a new trial were entered of record and argument proceeded before the court en banc.

While the post-trial motions were thus pending before the court and before a decision thereon was rendered, Lopinson filed a petition with the court asking leave to enter supplemental reasons in support of the post-trial motions and for the opportunity of taking testimony in connection therewith.

The crux of the petition was included in two allegations: (1) That subsequent to trial, Lopinson's counsel had secured "medical proof" of Phelan's incompetency at the time he testified; and, (2) That "at a proceeding before the court on July 27, 1965, Frank Phelan, under oath, recanted and repudiated his prior testimony and statements against" Lopinson.

The Commonwealth filed an answer to the petition requesting that Lopinson plead specifically the "medical proof" of Phelan's incompetency alleged to be in counsel's possession. Lopinson failed to respond to this request and subsequently, the court denied the petition to file supplemental reasons.

The allegation that Phelan recanted his testimony and statements against Lopinson is based on one of his statements before the court on July 27, 1965, in connection with his request for new counsel, namely, "and I just want to say for the record with reference to any criminal acts alleged to have been perpetrated by me, I now confirm nothing and strenuously deny everything."

Assuming that this amounted to a recantation of his testimony against Lopinson given publicly, under oath, on two separate occasions,[9] we have repeatedly held that we will not interfere with an order below refusing a new trial on the ground of recantation in the absence of a showing of a plain abuse of discretion. See *Commonwealth ex rel. Wilson v. Rundle*, 412 Pa. 109, 194 A. 2d 143 (1963). No abuse of discretion is evident here. In *Commonwealth v. Ruff*, 92 Pa. Superior Ct. 530, 535-536 (1927), it was stated as to recantation that: "We cannot interfere in this matter unless there is a plain abuse of discretion. In 16 C.J., page 1188, section 2715, the law generally upon this subject is stated that 'recanting testimony is exceedingly unreliable and it is the duty of the court to deny a new trial where it is not satisfied that such testimony is true. Especially . . . is this true where the recantation involves a confession of perjury. . . .' There is no form of proof so unreliable as recanting testimony." This language was expressly approved in *Commonwealth v. Palarino*, 168 Pa. Superior Ct. 152, 155, 77 A. 2d 665, 666 (1951), and in *Wilson*, supra, at 113, 194 A. 2d at ———.

If Lopinson's counsel were in possession of medical proof that Phelan was incompetent to testify at the Lopinson trial, certainly there should have been no reluctance to inform the court of the nature thereof. Moreover, until the court was given some definite knowledge of what this proof constituted, an intelligent appraisal of whether further proceedings were indicated was impossible.

While we have not discussed each and every asserted assignment of error, all have been carefully considered. After a consideration thereof, we find nothing therein, singularly or collectively, that warrants the grant of a new trial. Lopinson received a fair trial and we repeat, the verdict and sentences were fully warranted by the evidence.

Judgments affirmed.

Mr. Justice COHEN dissents.

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[9] For details, see *Commonwealth v. Phelan*, 426 Pa. 266, ——— A. 2d ——— (1967).

APPENDIX "B"

Opinion of the Trial Court

Before HAGAN, *P. J.*, GRIFFITHS and CHUDOFF, *JJ.*

OPINION PER CURIAM: May 12, 1966

Defendant, Jack Lopinson, has appealed from judgment of conviction, of first degree murder, after trial by jury, upon which the death sentence was twice imposed. Bill No. 469 charges the murder of Defendant's wife, Judith Lopinson. Bill No. 470 charges the murder of Defendant's business partner, Joseph Malito.

The evidence disclosed that defendant conspired with one Frank Phelan whereby Phelan, for money, would kill the two victims. Prior to the trial of Lopinson, Phelan had plead guilty as the actual killer in the two murder charges before Judge Alexander, but had not been sentenced. Subsequent to the trial of Lopinson, testimony on Phelan's guilty pleas was taken before Sloane, P. J., Alexander and Barbieri, JJ. Phelan was sentenced by the court to death.

Phelan testified in detail at the trial of Lopinson, describing brutal, cold-blooded killings by him in the basement of Dante's Restaurant, 1809 Chestnut Street, Philadelphia, on Thursday, June 18, 1964, while Lopinson was alone on the Restaurant floor. Subsequently Lopinson and Phelan went to the basement, where Lopinson told Phelan to shoot the victims again. Then, on the Restaurant floor, Phelan shot Lopinson's thigh, to put on the picture of a robbery. After Phelan left, Lopinson shot at the wall, then called police.

While Phelan's testimony, if believed, clearly and unequivocably convicted both himself and Lopinson of these two atrocious crimes, there was ample other evidence upon which the jury certainly based its verdict. A witness identified the defendant as coming with another man to Delaware

to purchase the weapons from him. Phelan gave police a statement that he was the other man. The death weapons were retrieved from the Delaware River. A ballistics expert established most of the bullets recovered as having been shot from the same weapons. Lopinson's intimate friendship with another woman was testified to by many witnesses. Lopinson himself gave weak and unconvincing testimony relative to his financial arrangements with Malito. There was considerable testimony upon which the jury could find the defendant wanted to rid himself of his wife.

While defendant and his witnesses offered testimony to contradict the Commonwealth's case, and to offer another story of what occurred that night, there certainly was more than sufficient evidence for the jury to find the defendant guilty. The matter of credibility of witnesses, and of resolving conflicts in testimony is, of course, for the jury. Here, they convicted defendant. In the opinion of the Court, their verdicts were clearly correct.

Defendant's multitudinous assignments for a new trial and in arrest of judgment were argued before the Court en banc, and were denied by the Court.

Many of these assignments were answered with reasons by an opinion filed for having denied defendant's motions to quash the indictments against him, and will not be repeated here; but incorporated herein by reference.

What appears to be defendant's primary reason for a new trial relates to certain alleged hearsay testimony of the Commonwealth's witnesses. Carl Marsini, Jean Salvi and Rosemarie DiPlacido, concerning financial transactions between the decedent, Joseph Malito, and the defendant; and from the Commonwealth's witness, Pasquale Malito,

decedent's son, relative to a conversation Joseph Malito allegedly had with Phelan in which the latter told the former he had a "contract" on Joseph Malito's life.

Carl Marsini, a friend of Joseph Malito, testified that late in April or early in May, 1964, Malito had told him that he had given $15,000 to Lopinson for a partnership in Dante's.

Jean Salvi, Joseph Malito's sister, testified that she had a bank account which was in her name but which consisted of funds that were the property of her brother and were subject to his instructions. She stated that shortly before April 24, 1964, Malito told her to withdraw $10,000 because he needed that sum to give to Lopinson, and that pursuant to these instructions she withdrew $10,000 and gave it to her brother. She also testified that on May 15, 1964, Malito asked her for another $5,000 for Lopinson. She testified that she withdrew the $5,000 and gave it to Malito, who told her that he had given it to Lopinson.

Rosemarie DiPlacido, Joseph Malito's daughter, testified that when Lopinson was in Florida her father had told her that he had given Lopinson $10,000. She further testified that after Lopinson had returned from Florida her father again told her that he had given Lopinson $10,000; that Lopinson was "broke" and was borrowing money from him, Malito; and that he, Malito, could not understand how Lopinson could have "spent all that money in such short time."

The Commonwealth contends that this testimony was admissible to show the *state of mind* of decedent, and cites as authority, *Com. v. Marshall*, 287 Pa. 512, 523 (1926) and *Com. v. Wilson*, 394 Pa. 588, 600 (1959).

The trial judge, at the time of its offer, ruled in favor of the Commonwealth.

In this respect, it is significant that Mrs. Salvi's testimony that she withdrew $15,000 of her brother's money and gave it to him would have been admissible as fact testimony, and from that testimony an inference might have

been drawn that the reason Malito had requested the money was to give it to Lopinson.

Subsequently, defendant himself testified that he had an original deal with Malito whereby Malito was to pay him, Lopinson, $15,000 for a half interest in Dante's. This, he said, was later changed and Malito was to pay him $5,000 (of which he said he had only received $3,500 at the time of Malito's death), and that Malito would pay an additional sum of $10,000 by assuming a portion of an obligation of Lopinson to a finance company which had lent him money. Lopinson testified that Mitchell Lipschutz, through a straw, owned one-half of the business and Lopinson owned the other half, and that it was this one-half interest that Malito was buying.

Lopinson was shown a $15,000 note to Malito, which he admitted he and his wife had signed. Lopinson was asked by his counsel why he signed a note for $15,000 to Malito when (a) he did not owe Malito anything but, in fact, Malito was indebted to him for the balance of the purchase price for an interest in the business, and (b) Lopinson never received $15,000, but only approximately $3,500 thereof. Lopinson's reply was (1) that he had given Malito the $15,000 note before the transfer of the one-half interest had been approved by the Liquor Control Board and there was then a possibility that the transfer might not be approved; and that therefore the note was to insure the return of the sum if the Liquor Control Board would not approve the transfer; and (2) that the amount of the note was $15,000 because that was what the amount was originally intended to be. Furthermore, Lopinson testified that the note was supposed to have been destroyed, and he assumed that it had been, but the evidence did not disclose where or under what circumstances the note was found.

At a later stage of the evidence Lopinson changed his testimony and stated that Malito was not to pay off $10,000 of Lopinson's obligation to the finance company, but that, to the contrary, he was to receive $5,000, and the remaining

$10,000 was to be used in some unspecified fashion for expansion of the business.

The full details of the financial relationship between Lopinson and Malito and others as to who owned what interest and how much was paid by whom to whom, were never clarified; nor were any documents produced other than the note from Lopinson to Malito.

In light of the hazy nature of the financial transactions between Lopinson and Malito, the fact that Lopinson admittedly signed a $15,000 note in favor of Malito, and the further fact testimony of Mrs. Salvi that she withdrew $15,000 of her brother's money and gave it to him, we concluded that the admission of the testimony of Marsini, Salvi and DiPlacido did not constitute prejudice against the defendant.

Relative to the testimony of Pasquale Malito, son of Joseph Malito, to the effect that prior to the killing of his father, the latter had informed the witness that Phelan had told him that he had a "contract" on his, Joseph Malito's life, the Commonwealth urged this also as indicating a state of mind. Here again, the defendant himself, in his direct testimony, testified to the same incident in respect to this, and there was no substantial conflict between the testimony of the defendant and Pasquale Malito as to what Phelan had said.

The law respecting such evidence was well stated by Mr. Justice Benjamin R. Jones in *Com. v. Thomas*, 410 Pa. 160 (1963). This was a first degree murder case, where the admission of the testimony of four witnesses for the Commonwealth was assigned as error on the ground that their testimony, consisting of statements and declarations of the decedent, was hearsay. The Commonwealth there claimed such showed a state of mind, an exception to the hearsay rule. Mr. Justice Jones there stated (pp. 17-171):

> ". . . While, in our view, the admission of their testimony into evidence could be justified (Commonwealth v. Marshall, 287 Pa. 512, 135 A. 301; Ickes v.

Ickes, 237 Pa. 582, 85 A. 885; Nuttall v. Reading Co., 235 F. 2d 546), yet, even if such testimony should not have been admitted, its reception into evidence was clearly harmless error. If we view this testimony in the light *most favorable* to Thomas, such testimony, if believed, would point to a relationship between Thomas and the deceased. That such relationship *did exist* was shown by *other* evidence—the admissibility of which is not questioned — presented by the Commonwealth. Thus, the admission of such evidence did no harm to Thomas and an examination of the instant record in its entirety fully confirms the fact that the admission of the testimony of thees witnesses, even if erroneous, did not prejudice Thomas."

This is clearly analogous to the case at bar.

There is, however, still a further reason why a new trial should not be granted the defendant based on such assignment of error. After the defendant had objected to the admission of such testimony and the Court, overruling the objection, admitted the same, the defendant did not continue to stand on his objection. Both on cross-examination of Commonwealth witnesses, and on examination of his own witnesses, defense counsel, on at least twelve different occasions elicited testimony to show the state of mind of either Judith or Malito, the decedents. He resorted to this type of evidence in his cross-examination of the following Commonwealth's witnesses: 1) David Seflin, Judith's father; 2) Joseph Kauffman; 3) Mrs. Irene Feldman; and 4) Sergeant McGinley. He injected such testimony in his direct examination of the following witnesses in presenting defendant's case: 1) Gene Groff (twice); 2) Jack Lopinson, the defendant (three times); 3) Nathan Stein; 4) Ralph DiPlacido, and 5) Mrs. Ann Lopinson, mother of defendant.

Furthermore, defense counsel, in his summation to the jury, referred to such testimony of Ralph DiPlacido, the son-in-law of Joseph Malito.

When counsel does not stand on his objection, but introduces the same type of testimony himself, he is deemed to have waived his initial objection to such testimony. In other words he himself cannot later use the type of testimony to which he has objected in the Commonwealth's case, without, by his use thereof, waiving his prior objection.

Thus, Wigmore (Third Edition) says, in Vol. 1, Sec. 14:

> "If the opponent *duly objected* and was erroneously overruled in the first instance, he could not claim to present similar inadmissible facts, because his objection would (in theory) save him, on appeal, from any harm which may accrue, and he needs no other protection.
>
> "But if he *did not object* and except, he has no such protection; and the question thus arises whether he can protect himself at the trial by retorting in kind."

By clear inference from this quotation it is evident that if he does put similar evidence in, he has waived his objection.

The defense urges that the trial judge erred in not ordering the witness Phelan to answer certain questions asked by defense counsel and, further, that the court should have ordered this witness to remove the sun glasses which he wore when he first testified. The trial judge took the position that any direction by him to Phelan to answer these questions would have been a futile order, in view of the fact that the witness had already entered a plea of guilty to an indictment charging him with the murder of two persons in respect to which he was presently incarcerated and awaiting sentence, and that therefore the Court was powerless to inflict any effective punishment on Phelan for his refusal to answer questions.

In evaluating the effect of the above, it is significant that 1) the witness subsequently answered the questions;

2) the questions, for the most part, bore only on collateral issues; 3) the Trial Judge charged the jury that in weighing the credibility of the witness they should appraise his "demeanor on the stand, remember the manner in which he testified, his apparent candor and frankness, or the lack of it"; and 4) the Trial Judge permitted wide latitude in the cross-examination of Phelan by defendant's counsel, as evidenced by the fact that, while the direct examination was encompassed within 40 pages of testimony, the cross-examination extended over 400 pages.

When Phelan later appeared on the stand, he was not wearing dark glasses and the jury then had an opportunity of seeing him eye to eye. Furthermore, the trial judge, in a supplement to the main body of the charge, in the very last instruction to the jury, said:

> "And, secondly, I want to charge you in a matter that I had intended to during my charge relating to the wearing of dark glasses by one of the witnesses, Frank Phelan, and an evidence by him of a refusal to remove his glasses while he was being examined on his first appearance in court.
>
> "When he appeared as a rebuttal witness, you will recall he was not wearing dark glasses.
>
> "I charged you relating to credibility or believability of witnesses, such as their interest in the outcome of a case, their apparent intelligence, and their ability to observe clearly and relate accurately what they observed, and other facets of determining believability of a witness.
>
> "Now, the fact that Phelan refused to remove his glasses is one of the numerous factors which you should consider in connection with your judgment as to whether or not he was telling the truth. And, of course, you are to consider the credibility of all the witnesses as to whether or not they are telling the truth, weighing their credibility or believability by every means that you have at your disposal as intelligent individu-

als, but particularly I wanted to relate to you concerning the dark glasses, that it's one of the numerous factors to be considered when you weigh the credibility of that particular witness."

We concluded the defendant suffered no harm relative to this matter. *Com. v. Morrison*, 157 Super. 366 (1945); *Com. v. Reed*, 152 Super. 249 (1943).

Other assignments of error, we believe, have been amply and sufficiently answered by the Commonwealth in their excellent brief filed with us and which we are sending to your Honorable Court with the other Record papers. We have every reason to believe they will be equally well covered in Commonwealth's brief to be filed in your Honorable Court. In order not to doubly burden an already over-burdened record we will not here repeat what the District Attorney has already so ably covered.

Finally, we would indicate that in a criminal case the test by which all trial errors are to be measured is whether or not they have deprived the defendant of the fundamentals of a fair trial. Errors in the abstract, such as the transgression of a rule of evidence, are not sufficient to warrant a new trial where a review of the entire record clearly demonstrates that the errors could not prejudice the defendant and could not have affected the verdict of the jury.

In the case of *Commonwealth v. Barnak*, 357 Pa. 391, 419, former Chief Justice Maxey, speaking for a majority of the Court, said:

> "Taking an appeal in criminal cases is not a game in which the appellant wins if he can show that the trial judge fell a few degrees short of perfection in the conduct of his trial. This court has consistently refused to reverse convictions of murder in the first degree, even with the death penalty imposed, for errors in the conduct of the trial or in the admission of evidence or in

the judge's charge, when these errors did not deprive the defendant of the fundamentals of a fair trial.

"In the recent case of *Commonwealth v. Chavis*, 357 Pa. 158, 53 A. 2d 96, in which the defendant was convicted of murder in the first degree, with the death penalty imposed, this court affirmed the judgment and sentence despite certain manifest errors in the record. In the case of *Commonwealth v. Moyer and Byron*, 357 Pa. 181, 53 A. 2d 736, in which both defendants were convicted of murder in the first degree, with the death penalty imposed, this court affirmed the judgment and sentence despite certain manifest errors in the judge's charge. In *Com. v. Skawinski*, 313 Pa. 453, 169 A. 895, in which the defendant was convicted of murder in the first degree, with the death penalty imposed, this court in an opinion by Mr. Justice Linn refused to reverse the judgment and sentence even though the trial judge in his charge to the jury committed plain error when he said: 'If for the good of the community you deem it necessary to find the accused guilty of murder in the first degree and to fix the penalty at death, you may consider that if that is your duty you should not shirk it.'"

In the concurring opinion in the same case, Justice Patterson said (p. 423);

"Distinction between harmless and prejudicial error transcends confinement by formula or precise rule. Determination of the category into which given error shall be placed requires an exercise of discretion by appellate tribunals which can only be resolved by examination of the entire record. Challenged statements must be viewed not as isolated utterances to a jury, but with due regard to their probable effect when considered with explanatory remarks which preceded or followed the statements in question.

"The objective review of an appellate court must guard against magnification on appeal in a criminal case of incidents of little importance in their setting: *Glasser v. United States*, 315 U. S. 60, 62 Sup. Ct. 457. Where the scales of justice are delicately poised between innocence and guilt, error which under some circumstances would not be too great for reversal, should not be brushed aside as immaterial. Where, however, as here, examination of the entire record clearly supports the finding of appellant's guilt beyond any reasonable doubt, and where a fair and impartial trial has been had, and the conclusion inescapable that the error did not influence the jury against the accused, the true administration of justice cannot be negatived by technical error which has not deprived an accused of his legal right to a fair trial: cf. *Commonwealth v. Blose*, 160 Pa. Superior Ct. 165, 170.

"Discussion of basic principles regarding determination of harmless error by the Supreme Court of the United States in *Kotteakos v. United States*, 328 U. S. 750, 66 Sup. Ct. 1239, is peculiarly applicable here. Mr. Justice Rutledge said (p. 761-2 66 Sup. Ct. 26 1246): "By its very nature no standard of perfection can be attained. But one of fair approximation can be achieved. . . . For, as with all lines which must be drawn between positive and negative fields of law, the precise border may be indistinct, but case by case determination of particular points adds up in time to discernible direction.

" 'In the final analysis judgment in each case must be influenced by conviction resulting from examination of the proceedings in their entirety, tempered but not governed in any rigid sense of stare decisis by what has been done in similar situations.' "

The language of former Chief Justice Maxey in the above case was quoted with approval in *Commonwealth v.*

Thompson, 389 Pa. 382 (1957); and in the case of *Commonwealth v. Linkowski*, 363 Pa. 420, 424 (1950), the Court said, citing *Commonwealth v. Barnak*, supra:

> "... *Mere error in the abstract is not sufficient to warrant a retrial*, and where the conclusion is inescapable that the error did not influence the jury against the accused, or deprive him of his legal right to a fair trial, a new trial will not be granted."

Conclusion

In the course of an extended voir dire of 248 prospective jurors, (said to be largest number in the history of this Judicial District), and the long trial lasting seven weeks, with a transcript of 5328 pages of testimony, the presiding judge was obliged to consider the rule upon an incredibly large number of objections, many of which demonstrated nothing more than a play to the gallery by defense counsel. In the opinion of his colleagues who sat with him in the Court en banc, the record shows that the Trial Judge, in his rulings on evidence and in his charge to the jury, displayed sound judgment and a zealous regard for the rights of the defendant. We are, therefore, of the very clear opinion that the defendant had a fair and impartial trial, that no basic or fundamental error was committed by the Trial Judge, that the evidence proved defendant's guilt beyond a reasonable doubt, and that therefore defendant's motions for new trial and in arrest of judgment were properly dismissed.

By the Court:

PETER J. HAGAN, *P.J.*
EDWARD GRIFFITHS, *J.*
EARL CHUDOFF, *J.*

APPENDIX "C"

Petition For Re-Argument Before Supreme Court of Pennsylvania

To the Honorable, the Justices of the Said Court:

The Petition of JACK LOPINSON, Appellant, respectfully prays your Honorable Court to grant a Re-Argument of this Appeal, and in support thereof respectfully submits the following:

I. Preliminary Statement

Appellant was tried and convicted in Philadelphia County of Murder in the First Degree on two Bills of Indictment (469 and 470, July Sessions 1964). Motions for New Trial and In Arrest of Judgment were denied by the Trial Court and on November 8, 1965 Appellant was sentenced to death in the electric chair on each Bill of Indictment. This Appeal to your Honorable Court followed and on September 26, 1967 this Honorable Court per Justice Eagen filed its opinion and order affirming the judgments below. A copy of the opinion of Justice Eagen is attached hereto and made part hereof as Exhibit "A".

The following points taken from the opinion of the Court it is hoped will demonstrate that in certain essential areas the Court inadvertently relied upon factual errors contained in the Brief filed by the Commonwealth Appellee and also misapprehended certain legal issues. It is submitted that the following recital of the factual errors requires that Appellant be granted re-argument so that clarification of the vital issues involved be achieved and the errors corrected.

II. Misapprehension as to Essential Facts Relating to Presence of Counsel During Interrogation.

A major argument of Appellant before this Honorable

Court was that the Trial Judge had erred in admitting before the jury certain statements made by Appellant to police detectives at a time when Appellant was regarded as a suspect and without any preliminary warnings by the police as to his right to counsel and his right to remain silent. See Appellant's Brief at pages 159 and following. On pages 13 and 14 of Justice Eagen's opinion the following statement appears:

> "Following the homicides and while Lopinson was in a hospital being treated for the bullet wound, he was interviewed by investigating officers who were seeking to ascertain a description of the two alleged hold-up men. *Lopinson's then self-retained counsel was present at all times during this questioning* and the record clearly proves that Lopinson's statements were truly volunteered, and not the result of any conduct in violation of his constitutional rights." (Emphasis added.)

The italicized language quoted above is incorrect as a statement of fact. But Justice Eagen was no doubt misled into making it because of the following incorrect statement of fact which is set forth on pages 109 and 110 of the Commonwealth's Brief:

> "Appellant, in his brief (p. 161) makes the following statement:
>
> > 'Despite the fact that appellant was a suspect from the very beginning, he was questioned extensively following the homicides while in the hospital undergoing treatment for a bullet wound. Such questioning took place in the absence of counsel and without any warning or statement to appellant that he had the right to remain silent and the right to consult counsel and a right to have counsel present at the time of any interrogation.'

This statement is inaccurate in every particular. The record establishes beyond dispute, a) at the time of the interview in the hospital, appellant's personal counsel, Mitchell S. Lipschutz, Esquire was present (R. 4129a), . . ."

The Commonwealth in its Brief states that the facts set forth on page 161 of Appellant's Brief are inaccurate. The Supreme Court in its opinion relying on this statement contained in the Commonwealth's Brief declares that "Lopinson's then self-retained counsel was present at all times during this questioning".

Neither the statement of the Commonwealth in its Brief nor its repetition by this Honorable Court in Justice Eagen's opinion is correct.

The actual facts are that when Lopinson was questioned by detectives, after they had concluded that he was involved in the crime and was a suspect, NO COUNSEL FOR LOPINSON WAS PRESENT AND NO STATEMENT WAS MADE TO HIM REGARDING HIS RIGHT TO COUNSEL OR HIS OTHER CONSTITUTIONAL RIGHTS. This is clearly established by the record and it is the Commonwealth's erroneous statement in its Brief that has misled the Court into believing that the record shows otherwise.

The references to the record where the foregoing may be found is clearly set forth in Appellant's Brief on pages 160 through 163.

For example, the record starting at page 887a establishes without a doubt, that at the time of the questioning complained of, Appellant was a suspect and that the questioning in the absence of counsel and without a warning of constitutional rights occurred at a "critical stage" of the proceedings:

1. The detective, who questioned Appellant, inferred that he suspected that Appellant was involved in the homicides because he had only sustained a flesh

wound, whereas the other people on the premises at the time of the alleged holdup had been killed (887a)

2. The detective also thought that the Appellant was lying in the story that he had given to the police prior to the time of the questioning complained of. (888a and 890a).

That the police regarded Appellant as a suspect at the time he was questioned in the hospital is resolved beyond a doubt by the following excerpt from the record:

Detective James Fowler, (Cross Examination):

. . .

"Q. Detective Fowler, if you had these suspicions that the story didn't add up in your mind, why didn't you get a search warrant?

MR. SPRAGUE: Objection sir.

THE COURT: Sustained. That's for the Court to determine.

BY MR. SPIVACK:

Q. Did you make any attempt to get a search warrant?

A. No, sir, I did not.

Q. Did you ever ask the defendant for the clothing?

A. No, sir, I did not.

Q. Why?

A. I felt that he had a definite connection with the crime. I wanted to get them to the laboratory as fast as I could. It was 5:00 o'clock in the morning. I knew it would take me some time to get a search warrant.

When Detective Wood came, I told him to take

them to the laboratory. I thought then I had reasonable grounds to do this.

Q. In other words, you thought that Jack Lopinson had something to do with the crime, and you therefore wanted these pants and the jacket as evidence?

A. I felt that he had some connection with the crime, yes, sir." (893a-894a)

After concluding that Appellant was very definitely connected with the homicides, the police interrogated him thoroughly, and the very damaging statements made by the Appellant at that time to the Police, when presented to the jury, probably did more to assure his conviction than any other single element in the case. There is no question that this Honorable Court has ruled that a suspect may not be interrogated in the absence of counsel and a warning of constitutional rights. The Commonwealth, in seeking to overcome this clear rule of law, has misstated the facts as to the presence of counsel and has thereby misled this Honorable Court.

The Record at pages 3935a clearly establishes that counsel was not present when Appellant was questioned and that Appellant was not warned of his Constitutional rights:

Detective James Weisback (Cross Examination):

. . .

"Q. Did you ask the defendant if he desired counsel before you questioned him?

A. No, sir, I did not.

Q. In your presence did anyone else mention anything with regard to legal assistance to the defendant?

A. Not in my presence, sir.

Q. Did you tell the defendant that anything that he would say could be used against him?

A. No, sir, I did not."

The Record also establishes with the utmost clarity that Appellant raised the very question of no counsel and

no warning before the Trial Judge and that the Trial Judge, relying on legal authority of *Commonwealth v. Patrick*, 416 Pa. 437 (1965), since overruled by *Miranda v. Arizona*, 384 U.S. 436 (1966), overruled Appellant's objections to the admissibility of the statements. See R. 4015a and 4016a:

"MR. SPRAGUE: I will ask Your Honor to rule upon the admissibility of these statements, then, sir.

THE COURT: Do you wish to say anything?

MR. PERUTO: Simply to point out three things, sir. That at the time of the making of this statement the defendant was without counsel, not having been warned of his rights or in any fashion stated that whatever was to be said was to be used as evidence against him.

Also at the time of the making of the statement the defendant was wounded and was in pain, as is evidenced by the fact that the doctor said that that sort of wound would produce pain. And the records themselves show that thereafter he was given certain drugs to relieve pain.

And I think that, therefore, they are circumstances surrounding the time of the giving of the statement; and, therefore, the statement could not be considered as one given with the knowledge of his rights or in such frame of mind as to be held responsible for his statements.

THE COURT: Do you wish to say anything, Mr. Sprague?

MR. SPRAGUE: Yes, sir.

That there is no requirement that the defendant at this stage had to be advised as to any rights. The only issue is whether or not what he said was voluntary. And the Court can rule upon this.

The latest case passing upon this is the case of Commonwealth of Pennsylvania versus Charles Pat-

rick. And I quote what the Supreme Court of Pennsylvania said there:

> 'We conclude that a statement or confession made during interrogation by the police, if voluntarily made, may be constitutionally admissible in evidence, even though the accused was neither warned of his right to remain silent nor of his right to counsel.' "

On the basis of *Commonwealth vs. Patrick*, the Trial Court below ruled that Appellant's statements were voluntary and therefore admissible even though the Record clearly shows no warning to Appellant of his constitutional rights.

Your Honorable Court since *Commonwealth vs. Patrick* has now made it very clear that the law of the Commonwealth of Pennsylvaina, in line with the *Miranda* decision, is that police questioning of a suspect is unconstitutional in the absence of counsel unless the suspect is effectively warned of his right to remain silent. *Commonwealth vs. Schmidt*, 423 Pa. 432 (1966).

Inasmuch as this Honorable Court's decision in the *Schmidt* case was also enunciated through the opinion of Justice Eagen, it can only be assumed that the erroneous statements in the Commonwealth's Brief are responsible for the statements contained in Justice Eagen's opinion in the instant case. The *Schmidt* case is very similar to the instant case in that the crime of murder there involved occurred in June of 1964, just as did the homicides in the instant case; the police questioning occurred in June of 1964, just as in the instant case; and the trial of Schmidt took place in February of 1965, whereas the Lopinson trial took place in January, February, and March of 1965. Inasmuch as the Record in the instant case so clearly conflicts with the opinion of the Court, it is respectfully submitted that clarification is required and that Your Honorable Court should therefore permit re-argument.

III. MISAPPREHENSION AS TO ESSENTIAL FACTS RELATING TO APPELLANT'S PETITION FOR LEAVE TO FILE SUPPLEMENTAL REASONS IN SUPPORT OF MOTIONS FOR NEW TRIAL AND IN ARREST OF JUDGMENT AND FOR HEARING.

Two additional misstatements of fact have given rise to another misapprehension and erroneous factual conclusion in the opinion of Justice Eagen. At pages 157 and 158 of Appellant's Brief the following statements appear:

> "On the basis of the information and reports obtained by counsel for appellant subsequent to the trial, but while the case was still pending in the Court below, appellant's counsel filed with the Court below a "Petition for Leave to File Supplemental Reasons in Support of Motions for New Trial and in Arrest of Judgment and for Hearing to Take Testimony and Re-Argument." Said petition is set forth in the record at page 6335a *et seq*. In the petition it was alleged that appellant had medical proof to present to the Court of the incompetency of Frank Phelan and that Frank Phelan, under oath, had recanted and repudiated the testimony and statements he had given against appellant. The petition also recited that the information in the possession of appellant's counsel had come to counsel subsequent to the time of the trial. Although the petition requested a hearing on the allegations contained therein the Court below denied the petition without hearing.
>
> "From the order denying the petition without hearing appellant immediately appealed to this Honorable Court. This Court, however, on petition of the Commonwealth entered its per curiam order on October 27, 1965, quashing the appeal."

The foregoing quotation from Appellant's Brief correctly states the facts. The Commonwealth's Brief and the Docket Entries of the Court below unfortunately misstate them and as a result of their misstatements this Honorable

Court, per Justice Eagen, has been misled into an erroneous factual statement in its opinion.

On pages 105 and 106 of the Commonwealth's Brief the following appears:

> "The Commonwealth filed a motion to require appellant to be more specific in his allegations. The specific information was never given, and this (sic) court denied appellant's petition. This action was clearly correct."

As will be shown below neither the foregoing statement nor the Docket prepared by the Clerk's Office below state what actually happened.

In the Docket Entries, page 2a of the Record, the following excerpts appear:

> "Sept. 13, 1965 Petition for leave to file Supplemental Reasons in Support of Motions for New Trial and Arrest of Judgment and for hearing to take testimony and for re-argument. Commonwealth's Motion to require the Defendant to amend his present (sic) with more specific pleadings, filed.
>
> Sept. 23, 1965 Present Hon. Peter Hagan
> Present Hon. Earl Chudoff
> Present Hon. Edward Griffiths
> After hearing the above petitions The Petitions are denied.
>
> Sept. 30, 1965 Certiorari from Supreme Court filed. Returnable the second Monday of November, 1965.
>
> Oct. 27, 1965 Appeal Quashed."

In his opinion Justice Eagen states:

> "The Commonwealth filed an answer to the petition requesting that Lopinson plead specifically the 'medical proof' of Phelan's incompetency alleged to be

in counsel's possession. *Lopinson failed to respond to this request* and subsequently, the court denied the petition to file supplemental reasons." (Opinion, page 27. Emphasis Added).

What are the actual facts?

1. On September 13, 1965 Appellant filed his Petition.
2. *On September 20, 1965* the Commonwealth filed its *Motion* requesting more specific pleading of the allegations in the petition.
3. On September 23, 1965, without any prior notice and without any opportunity on the part of Appellant to respond to the Commonwealth's Motion, the Court below, *without hearing*, denied the Appellant's petition.

Not only does the Commonwealth's Brief misstate the fact that the petition was denied because appellant failed to furnish specific information (the very nature of the petition was to seek the opportunity to do so) and not only does the Clerk's docket fail to accurately record the proceedings that actually transpired, but despite a thorough search in the office of the Clerk below and in the official record now in the Office of the Prothonotary of the Supreme Court, *neither the original petition, nor the original Commonwealth's Motion, nor the original Order of the Court below denying the petition, can be found.* Nor could these papers be found at the time of the preparation of the record for this appeal and at that time, by agreement between Counsel for Appellant and Counsel for Appellee, copies were furnished by Counsel to the printer for inclusion in the printed Record.* Counsel for Appellant does have, however, the copy of the Common-

* Many original pleadings and documents in the case were simply missing when the record was sent by the Clerk of the lower Court to the Prothonotary of the Supreme Court and in order to print a complete record it was necessary for Counsel on both sides to agree to the substitution of copies.

wealth's Motion served upon Counsel which shows that it could not have been filed prior to September 20, 1965 because the affidavit of verification attached thereto is not dated until September 20, 1965.

Were it not for the inaccurate factual statements in the Comonwealth's Brief and in the Docket indicating that Appellant failed to respond to an attempt by the Commonwealth to have Appellant furnish more specific facts in support of the allegations in the petition, Justice Eagen would not have concluded as he did. The very purpose of the Petition was to present proof of the allegations. It was error for the Court below to deny Appellant that opportunity. The Court entered its denial on its own motion. Not even the Commonwealth requested a dismissal of the petition without hearing!

The refusal of the Court below to hear Appellant's petition while the case was still within its jurisdiction was clear error. The denial of the petition without hearing has effectively deprived Appellant of the opportunity to raise the subject matter of the petition on orderly appeal to this Honorable Court.

In the case of *Commonwealth ex rel. Budd v. Maroney*, 418 Pa. 454 (1965), the appellant filed a post trial petition for a writ of Habeas Corpus on the ground that his conviction for murder in the first degree was obtained by the perjured testimony of a co-conspirator. The lower court denied the petition *without hearing*. This Honorable Court, speaking through Mr. Justice O'Brien, said:

> "The petitioner must be granted an opportunity to prove his allegations. Henderson should be brought into court to affirm or deny his affidavit and to be cross-examined by the Commonwealth. The issue of intentionally introduced perjured testimony must be determined. A mere examination of the record will not accomplish this end. The Federal precedents are clear and unequivocal on this point. A hearing must be held and, if the allegation is proved, the writ must be granted,

even if there is sufficient other evidence in the record to sustain the conviction. If, however, the hearing reveals that there was no perjury intentionally or knowingly introduced, the petition should be denied." (418 Pa. 454, 457. Emphasis added.)

The *Budd* case is factually and in principal almost on all fours with the instant case. Appellant's petition below sets forth allegations in principal identical to the allegations in the *Budd* petition. To deny Appellant's petition without hearing constitutes the identical error as was committed by the lower Court in the *Budd* case. If anything, the situation in the instant case was even stronger by reason of the fact that Appellant's petition was filed at a time when the case was still in the hands of the lower Court before final disposition of pending motions for new trial and in arrest of judgment.

IV. Misapprehension as to the Effect of Various Other Rulings of the Trial Judge

A. The Hearsay Testimony of Members of Malito's Family

On pages 21 and 22 of his opinion, Justice Eagen discusses the hearsay testimony of Malito's sister and daughter. He concludes that the testimony complained of was "pure hearsay" and inadmissible. "However," says Justice Eagen, "in view of all the testimony in the case, we are convinced it had no influence on the verdict, even though the Commonwealth did refer to it vigorously, but briefly, in its summation. It was, therefore, harmless error."

The characterization of this hearsay as "harmless" evidences a clear misapprehension by this Honorable Court of the damage caused to Appellant's case by its admission. This hearsay was "vigorously" referred to by the prosecutor in his summation because it supplied the essential ingredient to the Commonwealth's case—MOTIVE—the missing element that could not be supplied by anything other

than hearsay, speculation, innuendo and insinuation. Although no rule of law states that proof of motive is required in a murder prosecution, the Commonwealth knew that without establishing motive in the instant case the jury would not convict. Is hearsay that supplies the key to conviction "harmless?"

Justice Eagen himself recognizes how important supplying the motive through this hearsay was during the trial. In another part of his opinion not related to the question of hearsay he makes the following statement:

> "From the evidence the jury could also find that Lopinson wanted to get rid of his wife for another woman, his mistress; and *killing Malito would help solve his financial troubles* and render the false robbery story by two unknown intruders more plausible." (Opinion, page 3. Emphasis Added.)

It is respectfully submitted that just as Justice Eagen concluded the jury could find that Lopinson had Malito killed to help solve financial problems so did the prosecutor and the Court below. The only thing wrong with all three conclusions is that they are drawn from evidence which this Honorable Court acknowledges is "pure hearsay" and inadmissible. Justice Eagen by saying on page 3 of his opinion that the "jury could . . . find . . . killing Malito would help solve his financial troubles" proves more than any other argument could that the "pure hearsay" was *harmful.* There is no other evidence in the case of financial gain to Lopinson by killing Malito. Where, then, could the jury (and Justice Eagen) find this motive?

B. The Prejudicial Publicity During Selection of the Jury

This Honorable Court has concluded that Appellant received a fair trial despite unprecedented adverse newspaper publicity that exposed prosective jurors to improper influences during the very times that jurors were being called for examination on the voir dire. Without going into

a discussion of the voir dire examinations, which this Honorable Court found to be fair and just, Counsel for Appellant is constrained to suggest misapprehension on the part of the Court of the major issue raised by Appellant with respect to the newspaper publicly *during* this stage of the trial when the prospective jurors were not protected by sequestration and censorship of their reading matter. Sequestration of jurors occurred only *after* selection. The panels of prospective jurors from whom the actual jury was selected were in no way sequestered or deprived of the opportunity to read newspapers.

In the arguments to the Court below and to this Honorable Court, Appellant has taken exception to the express rulings by the Trial Judge that he had no power or authority to control the press during the trial and especially during the jury selection stage of the trial. Nowhere in Justice Eagen's opinion is this point discussed, yet it is this very essential issue that was extensively argued in Appellant's Brief and orally before this Honorable Court.

This issue is an important one and should be met by this Honorable Court. It is the very issue raised below in support of the applications for continuance and the rulings of the Trial Judge (See pages 25 and 26 of Appellant's Brief) to the effect that the Trial Judge could in no way restrict or control what the press said and how the press said it. The Trial Judge's rulings and reasons were directly contrary to the decision and specific rulings of the Supreme Court of the United States in *Sheppard v. Maxwell*, 384 U.S. 333 (1966), discussed extensively in Appellant's Brief at pages 25 through 29. In the *Sheppard* case the Supreme Court of the United States said that due process and a fair trial require the trial judge to do exactly that which the Trial Judge in the instant case was requested to do and which he ruled he had no power or authority to do. *Beck v. Washington*, 369 U.S. 541 (1962), cited by Justice Eagen on page 7 of his opinion, does not answer the quesion raised squarely and precisely by the rulings of the Court below *vis a vis* the *Sheppard* case.

C. *Misapprehension as to Issue Relating to Failure to Quash Indictments*

Appellant has complained below and before this Honorable Court that he has been deprived of due process and other constitutional rights because of the fact that within minutes of his arrest on July 15, 1964, he was indicted by the July, 1964 Philadelphia County Grand Jury. *Commonwealth v. Dessus*, 423 Pa. 177 (1966) was cited in this Court in support of Appellant's argument. The *Dessus* case stands for the proposition that where defendant is deprived of the *opportunity* to challenge the array of the grand jury *within a reasonable time* he has been denied due process of law. See 423 Pa. 177 at page 179. In the instant case this Court has distinguished *Dessus* by saying it applies only to indictments returned after January 1, 1965 and that prior to that date since a defendant had the opportunity to file a challenge even after indictment (so long as it was before a plea has been entered) he would not be deprived of constitutional rights even where he is indicted immediately following his arrest.

It is respectfully submitted that this Court has misapprehended the issue raised by Appellant in his Brief and upon oral argument. The issue is whether under the facts of the Lopinson case was due process denied by an indictment immediately following Appellant's arrest. The facts submitted to show that he was are the following:

1. At the time of his arrest the case and Appellant were the subject of tremendous and sensational publicity.
2. The arrest took place on July 15, 1964.
3. The indictment took place on July 15, 1964.
4. The Grand Jury returning the indictment had been sitting since the early part of July.
5. Appellant was never given a preliminary hearing.

6. Counsel were not appointed to represent the defendant-Appellant until September 11, 1964—more than seven weeks following his arrest and indictment and more than five weeks after the indicting Grand Jury had served their term and disbanded.

7. An order authorizing Appellant's Counsel to employ an investigator was not entered until October 13, 1964—more than twelve weeks following Appellant's arrest and indictment.

In view of the above-recited facts it is respectfully submitted that Appellant did not have an opportunity to challenge the array within a reasonable time of his indictment. Denial of this opportunity constitutes a denial of due process whether it is under the Rules of Criminal Procedure which went into effect January 1, 1965 or under the law prior thereto. The opportunity to challenge is a meaningless right if the opportunity to investigate grounds for challenge does not exist. In the instant case it is mere lip-service to a sacred constitutional right to say that Appellant could have challenged in September or October of 1964 following his indictment in July, 1964. To merely ask the question, "What information would it be possible to develop two or three months after indictment that would sustain a challenge to the array of the Grand Jury or a challenge to the qualifications of one or more Grand Jurors?" resolves the issue. The only meaningful interpretation of the rule of constitutional law that one must have the opportunity to challenge within a reasonable time of indictment is that reasonable opportunity must exist to investigate and discover grounds and reasons for challenge. That is what *Dessus* says and in so saying it is not limited to any date of demarcation.

In the instant case Appellant's lower Court Motions to Quash the Indictments were made on November 16, 1964—the earliest date that Counsel appointed on September 11,

1964, could with practicality reach that point considering the very many other pretrial motions, petitions and hearings involved in a major homicide case—but even had the Motions been filed two months earlier, it still was too late for Appellant to have investigated whether grounds for challenging the array or any individual Grand Juror existed. Since Appellant was denied this opportunity he has been deprived of due process and other constitutional rights.

D. *Misapprehension as to Issue Relating to Phelan's Competency*

This Honorable Court has dismissed Appellant's argument that the Court below erred in denying Appellant expert help in evaluating the mental competency of Frank Phelan. Justice Eagen states:

> "Long before trial Phelan had been examined by psychiatrists retained by the Commonwealth and also by his previous counsel, Mr. Walsh. Lopinson's trial counsel were fully aware of this before trial and had interviewed at least one of the psychiatrists involved concerning Phelan's condition. The testimony of any or all of these specialists as to any facts disclosed or conclusions reached as a result of their examinations of Phelan was available to the defense through subpoena. *They did not seek to pursue it.*" (Opinion, page 20, Emphasis added.)

The foregoing statement by Justice Eagen shows misapprehension of at least the following points and facts by the Court:

1. Appellant's Counsel were prohibited by the Court from interviewing Dr. John G. Torney, the psychiatrist appointed by the Court to examine Phelan until March 1, 1965, when the trial was practically over and even at that time Dr. Torney was directed

not to furnish Counsel with a copy of the report he had previously given to the Court.*

2. Into what proceeding could Appellant's Counsel have subpoenaed the doctors who examined Phelan? Does the opinion of Justice Eagen suggest that these doctors should have been put on the stand at the trial without any prior opportunity of Counsel to interview them?

3. The lower Court overruled pre-trial attempts of Counsel to obtain the services of a psychiatrist as an aid to the defense.

Perhaps, in a case where the psychiatric aspects are minimal or remote, the rulings of the Trial Judge might be understandable. But in a situation where the mental condition and competency of the star witness and alleged murderer permeates all the proceedings it must be deemed an abuse of discretion for the Court to deny defense counsel the tools necessary to explore the situation. Phelan admitted being a user of drugs. Prison authorities testified that powerful drugs were used at the prison to sedate and control him. His testimony at least hinted that there might be something wrong with him mentally. Yet none of this was sufficient to induce the Court below to permit Appellant to investigate the competency of the witness. Was this fair?

E. *The Cardonick Tape Recorded Statement*

In not ruling that the Trial Judge erred in prohibiting the playing before the jury of the tape recorded statement of Sidney Cardonick, this Honorable Court has overruled its decision in the case of *Commonwealth v. Hart*, 403 Pa. 652 (1961). See Appellant's Brief at pages 111 and following. In the *Hart* case this Court said properly authen-

* This prohibition existed despite the interviews and statements that Dr. Torney gave to the press. See Appellant's Brief, pages 33 and 34.

ticated tape recordings are admissible. The Court now says it is not error if a trial court rules out their admission in favor of a stenographic transcript. What is the law? Certainly the actual tape recording is better evidence than a written transcript. Then why change a good rule of evidence? In the *Hart* case it was the Commonwealth that introduced a tape recording against a defendant being tried for murder and this Court said the tape recording was proper evidence and the conviction was sustained. When a defendant being tried for murder seeks to introduce a tape recording to impeach a Commonwealth witness is a different rule of law applicable?

F. *The Issues Not Considered*

Although the opinion of Justice Eagen covers many of the points raised by Appellant in this appeal there are a number of major issues which the opinion does not discuss or decide. These issues still leave unresolved vital questions which, in a death case, should not be ignored. Some of the unresolved issues are:

1. Quashing of defense subpoenas (Appellant's Brief, page 163.)
2. Refusal of defense points for charge (Appellant's Brief, pages 135 and 151.)
3. The waiver of the attorney-client privilege (Appellant's Brief, page 166.)
4. Failure of the Trial Judge to control the witness Phelan and to permit Phelan to decide which questions he would answer.

WHEREFORE, your petitioner respectfully prays that this Honorable Court grant a re-argument in this appeal.

A. CHARLES PERUTO and
OSCAR SPIVACK
Attorneys for Appellant

APPENDIX "D"

Commonwealth's Answer to Appellant's Petition for Reargument

To the Honorable, the Justices of the Said Court:

The Respondent, Commonwealth of Pennsylvania, through its attorney, Arlen Specter, respectfully prays your Honorable Court to refuse to grant reargument of this Appeal, and in support thereof respectfully submits the following:

1. Prior to oral argument on this Appeal, each side filed lengthy and unusually extensive and complete briefs to this Honorable Court.

2. Upon oral argument before the entire Court, each side was granted substantial additional time for oral argument and, in addition, this Court conducted an exhaustive inquiry of counsel during the lengthy oral presentations. At the conclusion of oral argument, each side expressed its appreciation to the Court for the allowing of the fullest presentation during oral argument.

3. Before rendering its Opinion, this Court took an extraordinarily long time in deliberating upon the merits of this Appeal.

4. The lengthy Opinion filed by this Honorable Court on September 26, 1967, per Eagen, J., reflects the fact that this Court considered in detail and depth, the record of this case and the briefs and oral arguments made by each side as well as extensive discussion among the members of this Court.

5. In Appellant's Petition for Reargument, this Honorable Court will find that Appellant seeks simply an op-

portunity to reargue that which has heretofore already been extensively briefed, intensively orally argued, and thoroughly considered by this Court.

WHEREFORE your Respondent respectfully prays that this Honorable Court deny reargument.

By:

WILLIAM H. WOLF, JR.
Assistant District Attorney

For:

ARLEN SPECTER
District Attorney

APPENDIX "E"

Sampling of Newspaper Publicity From Date of Homicides Through Jury Selection Stage of Trial

1. *Philadelphia Inquirer*, June 26, 1964 — "Police Commissioner Howard R. Leary revealed Thursday that Lopinson had said through attorney Mitchell S. Lipschutz that he would not talk to the Police Department again but only to Crumlish. Leary said Lopinson gave no reason for the decision."

2. Philadelphia *Evening Bulletin*, June 26, 1964—"Referring to Lopinson's refusal to cooperate, Leary said: 'It's quite unusual and peculiar. This is the first time in my recollection that something like this has happened.' "

3. *Philadelphia Daily News*, June 26, 1964—"Leary said, 'It's quite odd that a victim of such a crime would ever refuse to talk to detectives' . . . the Commissioner said it was the first time 'in my recollection' that such a situation had occurred."

4. *Philadelphia Daily News*, June 30, 1964—"District Attorney Crumlish said he was 'distressed that the husband of the victim, Lopinson, would place any conditions on disclosing information which would aid the police in the solution of these brutal murders.' . . . Continuing, the District Attorney said 'It is indeed shocking that Lipschutz refuses to make any statement in the presence of police when he personally has relevant information concerning the financial operation of the establishment . . . I am at a loss to understand the reasoning of these two men.' "

5. *Philadelphia Inquirer*, June 30, 1964—*Lopinson 'distresses' District Attorney.*"

6. *Philadelphia Daily News*, July 2, 1964—MYSTERY CALL REVEALED IN 'EXECUTION' PROBE" . . .

"Revelation of strange phone call added new mystery today to the bizarre 'double execution' at Dante's Bar and Restaurant, 1809 Chestnut Street . . . Police Commissioner Howard R. Leary disclosed the phone call puzzler after two meetings yesterday failed to shed new light on the case.

7. *Philadelphia Inquirer*, July 4, 1964—"DISTRICT ATTORNEY ACCUSES LOPINSON OF HINDERING SLAYING PROBE." . . ."The District Attorney's office on Friday accused execution murder figure Jack Lopinson and his lawyer, William D. Harris, of 'hindering the Police' in the Dante's Restaurant killings . . . Assistant District Attorney Richard Sprague made the charge in reacting to a statement by Harris that Lopinson 'probably never' will voluntarily submit to police questioning."

8. *Philadelphia Inquirer*, July 4, 1964—"Sprague also asks that a psychiatrist and physician supplied by the Commonwealth be permitted to examine Lopinson 'to ascertain his condition' ".

9. *Philadelphia Inquirer*, July 5, 1964—"POLICE INVESTIGATE LITTLE BLACK BOOK KEPT BY LOPINSON" . . . "Jack Lopinson's admitted escapades with women are whetting the curiosity of police seeking a motive in the execution-murders of his wife and business associate Joseph (Joe Flowers) Malito, on June 19 in Dante's Restaurant, 1809 Chestnut Street . . . the intriguing new angles involved are: a little black book—but one that lists names of girls, phone numbers, exciting physical descriptions and sums of money." . . . "The story about Lopinson's little black book came from William B. Steck, Chief Clerk of the Board of Magistrates and Administrator of the Traffic Court."

10. *Philadelphia Inquirer*, July 5, 1964—"REJECTED LIE TEST" . . . "Lopinson collapsed at noon on the day of the shooting after he had been with police about eight hours—first in the emergency ward of Hahnemann Hos-

pital, then at homicide headquarters. The suggestion was made that he take a lie-detector test but he refused, the police said."

11. *Philadelphia Inquirer*, July 8, 1964—"POLICE STUDY FORGERY ANGLE IN LOPINSON KILLINGS" . . . "It was learned the forgery charge was contained in statements given to investigators by Yetta Feinberg, of 2308 Vista Street, who was listed as president of the Jaelo Corp., which was set up by Lipschutz last August for the purpose of operating Dante's — Police said Jack Lopinson signed his own name and that of Miss Feinberg to a judgment note for $18,150. last January."

12. *Philadelphia Inquirer*, July 9, 1964—"Underworld involvement in the slayings of Judy Lopinson, 25, and Joseph (Joe Flowers) Malito, 52, in the restaurant-bar at 1809 Chestnut street on June 19 was underlined late Wednesday when a Subpena was drawn up for Angelo Bruno, alleged head of the Cosa Nostra in Philadelphia. Police said Bruno was seen in Dante's 'more than once'."

13. *Philadelphia Inquirer*, July 15, 1964—"MYSTERY WOMAN IS HUNTED" . . . "A new woman mystery witness with the intriguing nickname 'little Madam' was injected Sunday into the Dante's Restaurant double-murder investigation . . . county detectives and homicide officers are looking for her."

14. *Philadelphia Inquirer*, July 21, 1964—"$50,000 SOUGHT BY PROBERS IN LOPINSON CASE." . . . "Accountants in the District Attorney's office investigating alleged 'monetary manipulations' by double-murder suspect Jack Lopinson indicated Monday that he may have secreted as much as $50,000. for safekeeping with a friend."

15. *Philadelphia Inquirer*, July 23, 1964 — "AUTHORITIES QUIZ 'MYSTERY WOMAN' IN DANTE'S SLAYINGS." . . . "Another attractive young woman entered the investigation of the 'execution-murders' at Dante's

Restaurant and underwent nearly 7 hours of police questioning Wednesday. Captain Joseph Golden, head of the homicide division, said the woman's statements were taken in preparation for the murder trial of Jack Lopinson, 27, operator of the restaurant."

16. *Philadelphia Inquirer*, July 25, 1964 — "CUSTOMER WARNED TO AVOID DANTE'S ON MURDER NIGHT" . . . "An employee of the teamsters' union was warned last June 19 to stay out of the Dante's Restaurant because there was 'going to be big trouble there,' the Inquirer learned Friday" . . . "It was received, according to investigators, by Virginia Garrison . . ."

17. *Philadelphia Daily News*, August 8, 1964 — "PHELAN IS 'SANE' FIRST TESTS SHOW" . . . "The evaluation was made by Dr. John G. Torney, chief of the neuro-psychiatric division of Quarter Sessions Court, who has supervised the testing of Phelan. 'He is in good touch with reality,' said Dr. Torney."

19. *Philadelphia Inquirer*, August 9, 1964—"LOPINSON ATTEMPTED TO INSURE WIFE FOR $10,000 BEFORE KILLING" . . . "Jack Lopinson attempted to buy a $10,000 life insurance policy in the name of his pretty dark-haired wife, Judy, just three weeks before she was murdered, it was learned Saturday . . . A detective who asked his identity be withheld told the Inquirer the California insurance firm was contacted but offered only limited cooperation in the investigation to establish a possible motive for the murder of Judy."

19. *Philadelphia Daily News*, August 12, 1964— "BIRDMAN READY TO SING AGAIN" . . . "Dr. Torney said that even though he's sure Phelan is sane and able to be believed, 'I couldn't say he is not suffering from a psychiatric problem' . . ."

20. *Philadelphia Evening Bulletin*, August 14, 1964— "LOPINSON REFUSED TESTS BY COURT PYSCHIA-

TRISTS" . . . "Jack Lopinson today refused to be examined by Quarter Sessions Court psychiatrists . . . Dr. Torney and Dr. Martin Hayes awaited him . . . 'We told him we are not interested in the accusations and the charges,' . . . Dr. Torney explained. 'We told him we are simply interested in examining him to determine his mental capabilities and emotional makeup.' Dr. Torney said he would be willing to make any examination in the presence of defense counsel . . . 'I think he realizes he is being charged with a serious situation,' the doctor said . . . 'We as court officers do not wish to infringe upon any of his rights. He does not have to answer a single question he doesn't want to' . . . Dr. Torney said: 'We are trying to find out if he is mentally competent and can confer with counsel and prepare his own defense.' "

21. *Philadelphia Evening Bulletin*, August 14, 1964— "GUN DEALER IDENTIFIES 2 FROM RIVER" . . . "Two newly-found revolvers the police say were used in the double murder at Dante's Restaurant on June 19 were shown to a Wilmington gun dealer at 1 A. M. today . . . 'it's recovery,' said Assistant District Attorney Richard A. Sprague, *'clinches the case.'* " (Emphasis added)

22. *Philadelphia Daily News*, August 14, 1964 — "DEALER LINKS DEATH GUNS TO LOPINSON" — "The dramatic findings of the murder guns off Pier 19 at Callowhill Street led Assistant District Attorney Richard A. Sprague to say jubilantly, *'This clinches our case.'* " (Emphasis added).

The trial commenced on Tuesday, January 19, 1965 with examination of prospective jurors. On that morning the Philadelphia Inquirer in an eight-column headline across the front page stated: "LIES TRIPPED LOPINSON, COURT TOLD." The subsidiary headline over the feature story on the first page stated: "Police Cite Suspicions in Killing of Two."

Other examples of newspaper publicity during the examination of unsequestered prospective jurors were:

1. *Philadelphia Inquirer*, January 20, 1965—eight-column headline, "LOVE NOTE LINKS LOPINSON, BLONDE."

2. *Philadelphia Daily News*, January 20, 1965, "LOVE ANGLE COULD HURT LOPINSON, DAD FEARS."

3. *Philadelphia Daily News*, Monday, January 25, 1965—"LOPINSON BLONDE ARRIVES, TALKS WITH PROSECUTOR".

4. *Philadelphia Inquirer*, January 25, 1965—"LOPINSON 'JURY TAMPERING' CALLED HARASSMENT OF DISTRICT ATTORNEY". This headine appeared in connection with a most prejudicial story at the start of the second week of the jury selection with still six jurors to be seated. The story is a completely extrajudicial one that is based entirely on alleged information released by the Prosecutor's office to the newspaper reporters, to the effect someone, implying a person associated with the defense, was trying to embarrass the Prosecutor by posing as a detective and doing things that would make it appear as if the Prosecutor were guilty of "jury tampering."

APPENDIX "F"

Excerpts From the Record Relating to the Testimony of the Witness, Frank Phelan, Alleged Co-Conspirator and Actual Killer

R 2372a-2373a

By MR. PERUTO:

Q. Now, Mr. Phelan, would you remove your glasses, please?

MR. SPRAGUE: I object. There is no point to that, sir.

MR. PERUTO: May the record show that he is wearing dark glasses, and I am requesting that he remove them, sir.

THE COURT: Objection sustained.

R 2373a-2375a

By MR. PERUTO:

Q. And where did you get the injections, Mr. Phelan?
A. In jail
Q. Why, Mr. Phelan? Do you know?
A. Do I know?
Q. Yes. Do you know why?
A. Yes, I know why.
Q. Pardon me?
A. I know why, yes.
Q. Tell us why:
A. Why?
Q. Do you or don't you know?
A. Yes, I know why, yes.
Q. Tell us.
A. Why should I?
Q. Because I asked you.

A. That ain't got anything to do with this case.

MR. SPRAGUE: That's all right. Tell him why you are getting the injections and the pills in prison, Frank.

THE WITNESS: To control my urges, that's why.

By MR. PERUTO:

Q. What are your urges?
A. To kill people.
Q. What people?
A. Anybody.
Q. For what reason?
A. I don't know.
Q. Do you need a reason to kill?
A. No.

R 2380a

Q. Where did you get those pills?
A. That's my business.
Q. Won't you tell us?
A. No.

R 2381a

Q. What pills did you take, if you know?
A. That's my business.

R 2381a-2382a

Q. Where did you obtain those pills that you took in that 24-hour period?

MR. SPRAGUE: Objection, sir.

THE COURT: *Well, if he wants to answer it, let him.* (Emphasis added.)

THE WITNESS: He already asked that question three times already.

THE COURT: *Then I take it you don't want to answer it.* (Emphasis added.)

THE WITNESS: That's right.

R 2381a

Q. Within the twenty-four hour period prior to puting all the bullets in these two peoples heads, how many pills had you taken?

A. That's my business.

R 2387a

By MR. PERUTO:

Q. Were you in the service, Mr. Phelan?

MR. SPRAGUE: I object, sir.

THE COURT: Sustained.

R 2399a

Q. Were you struck following your arrest?

A. I won't answer that question.

R 2406a

By MR. PERUTO:

Q. Now, what did you mean when you said the police leaned on you a little bit?

A. That's my business.

Q. You won't tell us?

A. What's that?

MR SPRAGUE: I object, sir.

THE COURT: He has given an answer. He said "That's my business."

MR PERUTO: Surely.

By MR. PERUTO:

If Your Honor please, since the credibility of any witness is for the jury, and it's their observation which is meaningful, I would ask that the Court direct that Mr. Phelan be made to remove the dark glasses which shield his eyes from the jury.

MR. SPRAGUE: Sir, again I object. I see no reason why or any other witness should have to take his glasses off.

THE COURT: Well, I have ruled on that when he made that motion before, and I think the same ruling should remain. So I will deny your motion.

R 2434-2435a

By THE COURT:

Q. Where was the test spot? Do you remember where the test spot was?

A. Yes, I know where it was at. The police know where it was at.

By MR. PERUTO:

Q. Well tell us. Where was the test spot?

A. You tell me where it was at.

MR. PERUTO: If Your Honor please, I ask that he be directed to answer.

THE COURT: You don't want to answer the question.

THE WITNESS: No, I don't want to answer the question.

MR. PERUTO: I ask the Court he be directed to answer.

THE COURT: It's my question. I will withdraw the question.

MR. PERUTO: Then I'll ask him.

By MR. PERUTO:

Q. Where was the test spot?

MR. SPRAGUE: Objection.

THE COURT: Sustained.

MR. PERUTO: If Your Honor please, I move that all the testimony of Frank Phelan be stricken on the ground that he refuses to answer questions.

MR. SPRAGUE: Your Honor sustained our objection to that question.

THE COURT: I will refuse your motion.

MR. PERUTO: I move for the withdrawal of a juror, sir.

THE COURT: Motion refused.

MR. PERUTO: If Your Honor please, I find—I don't understand why it's proper when Your Honor asks it and improper when I ask it.

THE COURT: *I withdrew the question. Now, it's obvious that you took the hint from me. You only asked it because I asked it.*

MR. PERUTO: If it's proper, what's the difference who asks it?

THE COURT: Well, I have ruled on it. (Emphasis added.)

R 2444a-2446a

By MR. PERUTO:

Q. Is it not a fact that you had the desire to kill people in June, 1964, independent of any arrangement with Jack Lopinson?

MR. SPRAGUE: Objection, sir.

THE COURT: Overruled.

THE WITNESS: That's right.

By MR. PERUTO:

Q. And how long had you had that desire?

MR. SPRAGUE: Objection, sir.

THE COURT: Sustained.

By MR. PERUTO:

Q. Is it not a fact that you had had that desire for two years previous?

MR. SPRAGUE: Objection, sir.

THE COURT: Sustained.

By MR. PERUTO:

Q. When is the first time that you had any discussion with Jack Lopinson regarding the killing of anyone?

MR. SPRAGUE: I object, sir.

THE COURT: Sustained.

R 2461a-2463a

Q. Where did you test fire those guns?

MR. SPRAGUE: Objection, sir.

THE COURT: Sustained.

MR. PERUTO: If Your Honor please, he has just testified that he test fired them all before giving them back.

THE COURT: All right. I will permit him to answer the question.

By MR. PERUTO:

Q. Where did you test fire them?
A. (No response.)

MR. SPRAGUE: Your Honor, I don't see its relevancy in the issue of this defendant's trial. I repeat my objection.

MR. PERUTO: Credibility of the witness, sir.

THE COURT: Well, is he going to answer the question or not. I haven't gotten any answer.

THE WITNESS: He asked that question last time.

THE COURT: I don't think you answered it. You said you didn't want to answer it. Is it the same response now?

MR. PERUTO: If Your Honor please, I object to the suggestion of a response to the witness by the Court.

THE COURT: I beg your pardon?

MR. Peruto: I object to the suggestion of a response to the witness by the Court.

THE COURT: Objection overruled.

MR. PERUTO: May I ask for the answer to the question?

MR. SPRAGUE: I object to that question sir.

MR. PERUTO: I think Your Honor already sustained it.

THE COURT: He is not answering the question, and let the record show that he is not answering the question.

MR. PERUTO: I ask Your Honor to direct the witness to answer the question.

THE COURT: No, I won't direct him to answer the question.

MR. PERUTO: I ask since I am curtailed on that cross-examination that his entire testimony be stricken.

THE COURT: Your motion is denied.

MR. PERUTO: I move for the withdrawal of a juror, sir.

THE COURT: Your motion is denied.

Q. Now, you stated that you had plenty of guns. What guns did you have?

MR. SPRAGUE: Objection, sir.

THE WITNESS: That's my business.

THE COURT: Sustained.

R 2469a-2470a

Q. Well, how long did you wait before you went to kill him?

A. Until the juke box came on.

Q. How long was that?

A. I didn't have a watch.

Q. Did you estimate it?

A. Could I estimate it?

Q. Yes.

A. I could, but I'm not.

MR. PERUTO: I ask Your Honor direct him to answer the question.

THE COURT: *I'll not do a futile thing. If I direct him to answer questions, he is not going to answer them, and I'm not going to ask him to answer them.*

MR. PERUTO: If Your Honor please, then I would move that his entire testimony be stricken.

THE COURT: Motion is denied.

(Emphasis added.)

R 2483a-2484a

Q. For what purpose were you taking them?
A. *That's my business.*

MR. SPRAGUE: Objection, sir.

THE COURT: *Well, he has answered the question.*

MR. PERUTO: Then I direct that Your Honor—I request that Your Honor direct him to answer.

MR. SPRAGUE: I still object to the question, sir.

THE COURT: *He has answered it in the manner in which he wishes to answer it.*

MR. PERUTO: I understand that Your Honor will not direct him to answer.

THE COURT: That's correct.

MR. PERUTO: I move that all his testimony be stricken, sir.

THE COURT: Motion denied.

MR. PERUTO: I move for the withdrawal of a juror, sir.

THE COURT: Motion denied. (Emphasis added.)

R 2484a-2485a

Q. How did the pills make you feel, sir?

MR. SPRAGUE: Objection, sir.

THE COURT: Overruled.

THE WITNESS: That don't have anything to do with this. That don't have anything to do with this at all.

MR. PERUTO: I request that Your Honor direct him to answer.

THE COURT: I will deny your request.

MR. PERUTO: Move for the withdrawal of a juror, sir.

THE COURT: Motion denied.

MR. PERUTO: I move that his testimony be stricken, sir.

THE COURT: Motion denied.

Q. How many pills did you take that day?

MR. SPRAGUE: Objection, sir.

THE COURT: Overruled.

THE WITNESS. I'm here to straighten out Dante, not what I do, how many pills I take.

By MR. PERUTO:

Q. How many pills did you take, sir?
A. I told you an hour ago that's my business.

MR. PERUTO: I ask the Court direct him to answer.

THE COURT: Motion refused.

MR. PERUTO: I ask that his testimony entirely be stricken, sir.

THE COURT: Motion refused.

MR. PERUTO: I move for the withdrawal of a juror, sir.

THE COURT: Motion refused.

R 2513a-2514a

By MR. PERUTO:

Q. And nobody would have known if there was anything in the safe, you say?

A. Outside of Jack Lopinson, I don't think so.

Q. But anybody would have been able to see the receipts in the tin box, wouldn't they?

A. What's that?

Q. Anybody would have been able to have seen the receipts in the tin box, wouldn't they?

MR. SPRAGUE: Now, sir, this is argumentative.

THE COURT: *I was waiting for how long it would take you to object to all the argumentative questions.*

MR. SPRAGUE: *I objected to so many I thought I would stop for a while.*

THE COURT: Objection sustained.

MR. PERUTO: I move for the withdrawal of a juror because of the remarks of the Assistant District Attorney and the Court.

THE COURT: Motion denied. (Emphasis added.)

R 2719a-2722a

By MR PERUTO:

Q. Now, Mr. Phelan, I notice that all day today also you have been wearing black glasses which cover your eyes so that they can't be seen. Is there anything wrong with your eyes, sir?

A. These glasses are prescription glasses.

Q. Who prescribed them, sir?

A. I did.

Q. You did?
A. That's right.
Q. Who gave them to you?

MR. SPRAGUE: I object, sir.

THE COURT: Overruled.

THE WITNESS: I bought them.

By MR PERUTO:

Q. Where, sir?
A. On the street.
Q. Do you require them in order to enable you to see?
A. That's right.
Q. Can you see without them?
A. That's right.

THE COURT: You can or cannot see without them?

THE WITNESS: I can see without them, that's right.

By THE COURT:

Q. Why do you need them, then?
A. I have a bad eye.
Q. Which one?
A. Right.
Q. What is wrong with it, if you know?
A. Bad vision.

By MR. PERUTO:

Q. Do the black glasses improve your vision?

MR. SPRAGUE: Now, sir, I object.

THE COURT: I don't think he would know that.

MR. PERUTO: I think that he would certainly know whether he could see better with black glasses on other than the—

THE COURT: Why do you need them dark?

THE WITNESS: I need them dark so I don't get headaches.

THE COURT: So you don't get what?

THE WITNESS: Headaches.

THE COURT: Headaches?

THE WITNESS: That's right.

By MR. PERUTO:

Q. Would you remove them for just a brief period of time, Mr. Phelan, so that we can see your eyes?

MR. SPRAGUE: Sir, I thought this was ruled upon twice by this Court.

THE COURT: I think I did.

MR. PERUTO: Well, I think sir, that the appearance of the witness is for the jury to determine as one of the tests of credibility and I believe that I have submitted law since Your Honor's last ruling in that regard. And I would ask that he be requested to remove them briefly. I don't want to let him suffer as a result of their removal, since he has prescribed these glasses for himself; but, nevertheless, for that brief period I think that the Jury is entitled to see his eyes.

THE COURT: Any reason why you shouldn't remove your glasses temporarily so the Jury can look at you and you look at them?

THE WITNESS: Yes. I'm not here for display; I'm here to relate the story about Dante's.

THE COURT: I beg your pardon?

THE WITNESS: Yes. I'm not here for display; I'm here to relate a story about Dante's.

MR. PERUTO: If that's his only reason, sir, I would ask Your Honor direct that he remove them.

MR. SPRAGUE: I maintain my objection, sir.

THE COURT: I think that his refusal to remove them at the request is a circumstance for the jury to take into consideration.

MR. PERUTO: Very well, sir. So long as that—the Jury is instructed to do that.

THE COURT: They can take into consideration his explanation and weigh his credibility based on that.

MR. PERUTO: Thank you, sir.

R 2727a-2728a

Q. Do you have the present desire to kill, Mr. Phelan?
A. I don't want to answer them kind of questions.

* * * * *

MR. PERUTO: I ask Your Honor direct him to answer the question.

THE COURT: *I told you before I'm not going to ask a futile thing.* (Emphasis added.)

R 2748a-2749a

Q. Now, first how many pills did you take that day, the day, 24 hours preceding the murder?
A. Two.
Q. Two?
A. Right.
Q. Where did you get them?
A. That's my business.
Q. What were they?
A. In the morning I had a tranquilizer, and at night-time I had a pill of Dexamyl.
Q. What?
A. Dexamyl. It keeps you awake.

Q. And where did you obtain it?

A. I told you that is my business. You said what did I have? I told you what I had. It didn't make my memory go nowhere. I was sane.

MR. PERUTO: I ask Your Honor in view of his testimony to direct the witness to answer the question where he got them.

MR. SPRAGUE: No, sir. I object again on the same basis.

THE COURT: Objection sustained.

MR. PERUTO: I move that all his testimony be stricken, then, sir.

THE COURT: Motion denied.

MR. SPRAGUE: I oppose it.

MR. PERUTO: And I move for the withdrawal of a juror.

THE COURT: Motion denied. You are just repeating the same thing. Now I'm not going to let you go on and repeat these all over again.

MR. PERUTO: Your Honor, you can see it has been fruitful by doing it, that now he has changed his mind.

THE COURT: You came up with the same result.

APPENDIX "G"

Pennsylvania Statutes Involved

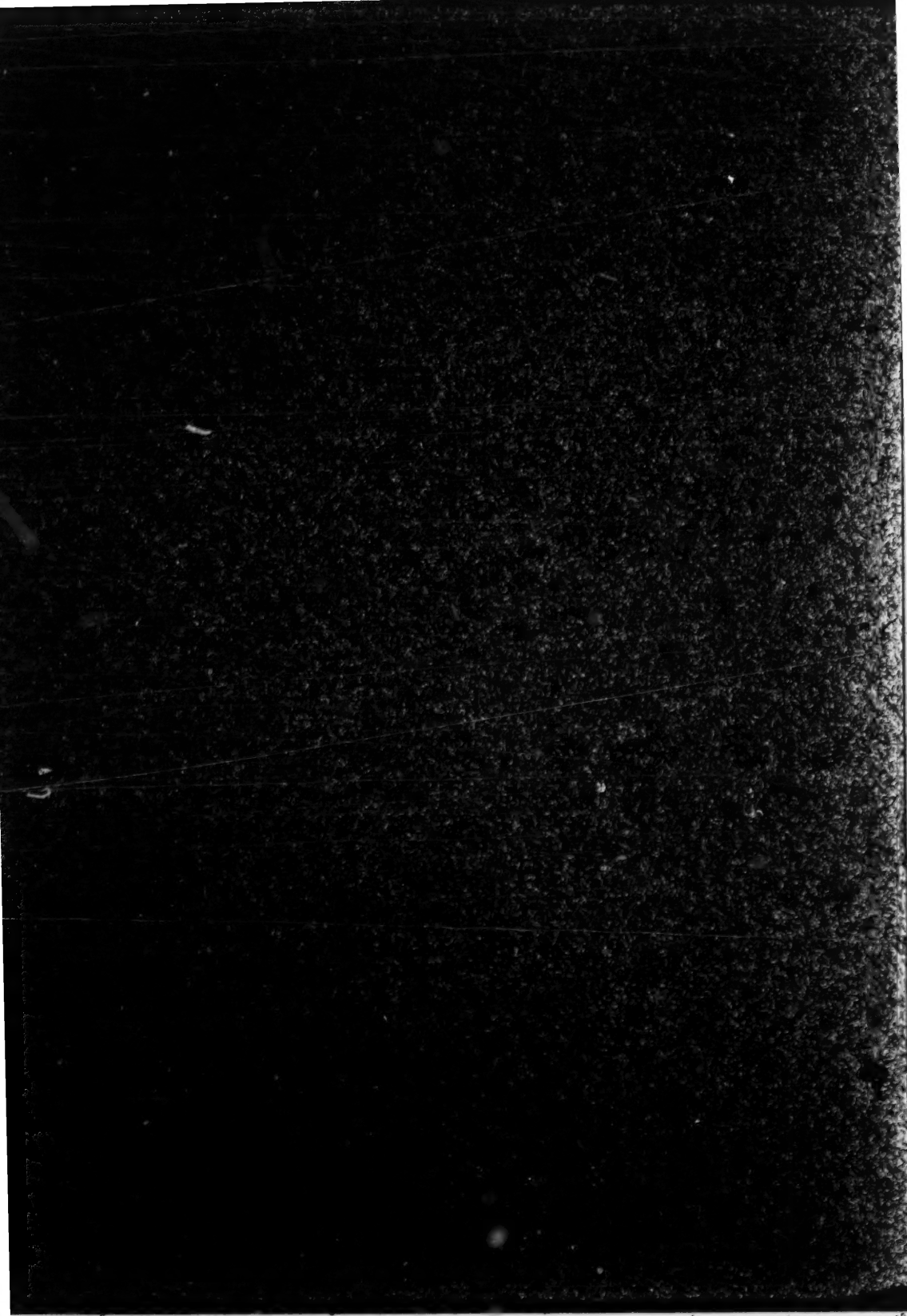
Act of June 24, 1939 PL 872, §701; as amended by the Act of December 1, 1959, PL 1621, §1.

Whoever is convicted of the crime of murder of the first degree is guilty of a felony and shall be sentenced to suffer death in the manner provided by law, or to undergo imprisonment for life, at the discretion of the jury trying the case, which shall, in the manner hereinafter provided, fix the penalty. In the trial of an indictment for murder, the court shall inform the jury that if they find the defendant guilty of murder in the first degree, it will be their further duty to fix the penalty therefor, after hearing such additional evidence as may be submitted upon that question. Whenever the jury shall agree upon a verdict of murder of the first degree, they shall immediately return and render the same, which shall be recorded, and shall not thereafter be subject to reconsideration by the jury, or any member thereof. After such verdict is recorded and before the jury is permitted to separate, the court shall proceed to receive such additional evidence not previously received in the trial as may be relevant and admissible upon the question of the penalty to be imposed upon the defendant, and shall permit such argument by counsel, and deliver such charge thereon as may be just and proper in the circumstances. The jury shall then retire and consider the penalty to be imposed and render such verdict respecting it as they shall agree upon. A failure of the jury to agree upon the penalty to be imposed, shall not be held to impeach or in any way affect the validity of the verdict already recorded, and whenever the court shall be of opinion that further deliberation by the jury will not result in an agreement upon the penalty to be imposed, it may, in its discretion, discharge the jury from further consideration thereof, in which event if no retrial of the indictment is directed, the court shall sentence the

defendant to life imprisonment upon the verdict theretofore rendered by the jury, and recorded as aforesaid. The court shall impose the sentence so fixed as in other cases. In cases of pleas of guilty, the court where it determines the crime to be murder of the first degree, shall, at its discretion, impose sentence of death or imprisonment for life. Where a sentence of death is imposed, the clerk of the court, wherein conviction takes place, shall, within ten (10) days after such sentence of death, transmit a full and complete record of the trial and conviction to the Governor.

Act of June 19, 1913, PL 528, §1:

Every person, his aiders, abettors and counsellors, hereafter convicted of the crime of murder of the first degree, shall be sentenced to suffer death in the manner herein provided, and not otherwise. Such punishment, in every case, must be inflicted by causing to pass through the body of the convict a current of electricity of intensity sufficient to cause death, and the application of such current must be continued until such convict is dead. The said punishment shall be inflicted by the warden or deputy warden of the Western Penitentiary, or by such person as the warden shall designate, and shall be inflicted in a building to be erected on the land owned by the Commonwealth in Centre County, whereon the buildings of the new Western Penitentiary are to be built.



INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	1
Statement	2
Argument	5
I. Lopinson's Constitutional Rights Were Not Violated by the Refusal of the State Court to Quash the Indictments	5
II. There was no Denial of Due Process in the Refusal of the Trial Court to Postpone the Trial Because of Alleged Prejudicial Pre-trial Publicity	2
III. None of Petitioner's Constitutionally Guaranteed Rights Were Violated by Various Trial Rulings	10
IV. The Examination of Prospective Jurors as to Their Conscientious Scruples Against Capital Punishment Does Not Violate Due Process	20
V. The Imposition of the Death Penalty by a State Court in a Proper Case Does Not Violate Any Constitutional Provisions	22

PAGE

VI. The Statements Given by Petitioner to the Police at the Scene of the Killings and Subsequently at the Hospital Were Admissible Against Him 24

VII. The Denial of Post-Trial Motions Was Proper and Raises no Constitutional Issue 26

Conclusion 27

TABLE OF CITATIONS

FEDERAL CASES:

Armstrong v. Manzo, 380 U. S. 545 (1965) 6

Beck v. State of Washington, 369 U. S. 541 (1962) . . 6, 8, 9

Brady v. Maryland, 373 U. S. 83 (1963) 18

Brown v. Allen, 344 U. S. 443 (1953) 12

Buchalter v. New York, 319 U. S. 427 (1943) 11

Chapman v. California, 386 U. S. 18 (1967) 12

Gevinson v. United States, 358 F. 2d 761 (5th Cir. 1966) 17

In Re Kimmler, 136 U. S. 436 (1890) 24

Jencks v. United States, 353 U. S. 657 (1957) 17, 18

Johnson v. New Jersey, 384 U. S. 719 (1966) 7, 22, 25

Lisenba v. California, 314 U. S. 219 (1941) 12

Logan v. United States, 144 U. S. 263 (1892) 21

Louisiana ex rel. Francis v. Resweber, 329 U. S. 459 (1947) 23

PAGE

Maxwell v. United States, 368 F. 2d 735 (9th Cir. 1966) 19

Michelson v. United States, 335 U. S. 469, 479 (1948) 15

Miranda v. Arizona, 384 U. S. 436 (1966) 25

Overstreet v. United States, 367 F. 2d 783 (5th Cir. 1966) 23

Rochin v. California, 342 U. S. 165 (1952) 11

Sheppard v. Maxwell, 384 U. S. 33 (1966) 8, 9, 10

Spencer v. Texas, 385 U. S. 554 (1967) 12

Stovall v. Denno, 388 U. S. 719 (1966) 22

Trop v. Dulles, 356 U. S. 86 (1958) 24

Turberville v. United States, 303 F. 2d 411, 420 (D. C. Cir. 1962) 21

United States v. Bowe, 360 F. 2d 1 (2d Cir. 1966) ... 13

United States v. Hoffa, 349 F. 2d 20 (6th Cir. 1965), aff'd 385 U. S. 293 (1966) 6

United States v. Murray, 297 F. 2d 812 (2d Cir. 1962) 16

United States v. Sferas, 210 F. 2d 69 (7th Cir. 1954) 13

United States v. Toner, 173 F. 2d 140 (3d Cir. 1949) 15

Weems v. United States, 217 U. S. 349 (1910) 24

Wilkerson v. Utah, 99 U. S. 130 (1878) 24

PENNSYLVANIA CASES:

Commonwealth v. Bentley, 287 Pa. 539, 135 A. 310 (1926) 21

Commonwealth v. Caplan, 411 Pa. 563, 192 A. 2d 894 (1963) 16

PAGE

Commonwealth v. Dessus, 423 Pa. 177, 224 A. 2d 188 (1966) 7

Commonwealth v. Lopinson, 427 Pa. 284, 234 A. 2d 552 (1967) 1, 3, 6, 7, 12, 14

Commonwealth v. McGrew, 375 Pa. 518, 100 A. 2d 470 (1953) 13

Commonwealth v. Pasco, 332 Pa. 439, 2 A. 2d 736 (1938) 21

Commonwealth v. Phelan, 427 Pa. 265, 234 A. 2d 540 (1967) 3

Commonwealth v. Powell, 428 Pa. 275, —— A. 2d —— (1968) 19

Commonwealth v. Raymond, 412 Pa. 194, 194 A. 2d 150 (1963) 19

RULE:

FED. R. CRIM. PROC., Rule 17(c) 16

STATUTE:

28 U. S. C. §1257(3) 1

ORDINANCE:

Philadelphia Code, Sec. 2-102 2

OPINIONS BELOW.

The opinion of the Supreme Court of Pennsylvania affirming judgments of sentence is reported at 427 Pa. 284, 234 A. 2d 552 (1967) (Appendix A of Petition). The opinion of the trial court is unreported (Appendix B of Petition).

JURISDICTION.

Petitioner asserts that jurisdiction of this Court is invoked under 28 U. S. C. §1257(3). Respondent contends that this case presents no questions involving any right, privilege or immunity set up under the Constitution of the United States.

QUESTIONS PRESENTED.

1. Were any of petitioner's constitutional rights violated by the state court's refusal to quash the indictments?

2. Was due process violated by the state court's denial of a motion for a continuance on the basis of alleged prejudicial pre-trial publicity?

3. Did any of the various trial rulings complained of by petitioner violate due process?

4. Did examination of prospective jurors as to their conscientious scruples against capital punishment violate due process?

5. Does the imposition of the death penalty by a state court in a proper case violate any constitutional provisions?

6. Were the statements given by petitioner to the police at the scene of the killings and subsequently at the hospital admissible against him?

7. Was the denial of post-trial motions proper?

STATEMENT.

On July 15, 1964, petitioner, Jack Lopinson, following the conclusion of an inquest conducted by the Medical Examiner of the City of Philadelphia,[1] was charged with the murders of his wife, Judith Lopinson, and of his partner, Joseph Malito, and held for action of the grand jury. He was indicted on the same day. Later in the same month, Frank Phelan was arrested on a warrant charging him with the same murders, and, on July 26, 1964, after a hearing before a magistrate, Phelan was also held for action by the grand jury. On the following evening, July 27, Phelan summoned the senior officer of the prison and told him that he wanted "to confess who committed the murders." The homicide division of the Philadelphia police was notified and the following morning Phelan gave a detailed, recorded, factual description of the killings and the circumstances which led up to them. The taking of this statement was interrupted temporarily to enable Phelan to appear in court and testify, under oath, in a habeas corpus proceeding insti-

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[1] In Philadelphia, the Medical Examiner has replaced the former office of Coroner and possesses all the powers of a Coroner. **Philadelphia Code of Ordinances** §2-102 (enacted under authority of the **Philadelphia Home Rule Charter**, adopted April 17, 1951). These powers include those "relative to the investigation of sudden violent and suspicious deaths and the determination of whether the person or persons responsible shall be charged with crime."

tuted by Lopinson, wherein he sought his discharge on the ground, inter alia, that there was insufficient evidence to charge him with the crimes. The petition for habeas corpus was denied. Lopinson pled not guilty and went to trial before a jury.[2]

At Lopinson's trial Phelan appeared as a witness for the Commonwealth. On March 4, 1965, Lopinson was found guilty of murder in the first degree in each case and the jury fixed the penalty at death. Following dismissal of motions for new trial and in arrest of judgment by a court en banc, sentences were imposed in accordance with the jury's verdicts. Lopinson appealed to the Supreme Court of Pennsylvania. After extensive argument, wherein substantially the same matters now raised in the present petition were urged, the judgments were affirmed. *Commonwealth v. Lopinson*, 427 Pa. 284, 234 A. 2d 552 (1967).

The facts relevant to this petition are: Early in the morning of June 19, 1964, about 3:30 a.m. Judith Lopinson, petitioner's wife, and Joseph Malito were shot to death in the basement office of a restaurant, known as Dante's Restaurant, located in Philadelphia's centre-city. At that time the restaurant was operated by Lopinson and Malito under a partnership agreement. The basic facts as to the murders are as follows:

Lopinson requested Phelan to kill both his wife and Malito for an agreed cash sum. Phelan agreed to perform the services. Shortly before the killings Lopinson drove Phelan in his automobile to the state of Delaware to secure the murder guns for which Lopinson paid the purchase price. The time and place for the commission of the killings were suggested by Lopinson; originally the crimes

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[2] Phelan, subsequently, pled guilty generally to two indictments charging him with the murders. After a hearing before a three-judge court, Phelan was found guilty of murder in the first degree in each case and sentenced to death. The judgments of sentence were affirmed by the Supreme Court of Pennsylvania: **Commonwealth v. Phelan**, 427 Pa. 265, 234 A. 2d 540 (1967).

were planned for two nights earlier but at the last minute were deferred. A few hours before the killings Phelan and Lopinson discussed and reviewed the final plans in Phelan's automobile. At Lopinson's suggestion Phelan entered the basement of the restaurant through a rear cellar door and hid himself. He waited there for the restaurant to close and for Judith Lopinson and Malito to come from the first floor of the restaurant to the basement office to count the day's receipts. Upon their arrival Phelan entered the office with a gun in each hand and shot each victim in the head twice. Phelan went upstairs and reported the shootings to Lopinson; they returned together to the basement office and, upon discovering that neither Judith Lopinson nor Malito was dead, Phelan at the request and in the presence of Lopinson, fired two additional bullets into the heads of both victims. The two then returned upstairs and discussed the explanation previously agreed upon that Lopinson would give the police, viz., that the restaurant had been held up by two unknown men who had fatally shot Judith Lopinson and Malito and also shot Lopinson. To bolster this concoction, Phelan shot Lopinson through the fleshy part of his thigh. After Phelan left the premises Lopinson fired a bullet from his own gun into a wall of the restaurant. When the police arrived, Lopinson told them the fabricated story about the restaurant robbery. (At his trial Lopinson admitted that the story he gave to the police was a lie. Since Phelan had already testified as to the shootings as above related, Lopinson abandoned his prepared version and gave another equally incredible explanation.)

From the evidence, the jury could have logically found that the purpose of the shooting was that Lopinson wanted to get rid of his wife for another woman, his mistress, and the killing of Malito would aid in solving Lopinson's substantial financial difficulties and render the false robbery story by two unknown intruders more plausible.

When Phelan left the premises he drove to a pier on the

Delaware River and threw the guns he used into the river. After his confession, Phelan directed the police to the area and the two guns were recovered. Ballistic tests established these guns as the murder weapons.

As we have previously indicated, Lopinson's trial was extensive; many witnesses were heard whose testimony supported and corroborated numerous aspects of Phelan's testimony.

ARGUMENT.

I. LOPINSON'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED BY THE REFUSAL OF THE STATE COURT TO QUASH THE INDICTMENTS.

Following the conclusion of an inquest conducted by the Medical Examiner of the City of Philadelphia,[3] Lopinson was held for action by the Grand Jury. On the same day (July 15, 1964) Lopinson was indicted by a Grand Jury which had already been in regular session for two weeks. Following the appointment of counsel for Lopinson, a motion to quash the indictments was filed. It was contended that no notice of the presentment of the bills to the Grand Jury had been given to Lopinson and thus he was denied the opportunity to investigate and challenge any member of the Grand Jury for cause or to challenge the array. The trial court fixed a time for hearing to afford Lopinson every opportunity to produce any pertinent facts. He produced nothing nor offered to produce any evidence to establish any challenge to any juror or to the panel. The motion to quash was denied.[4]

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[3] See **supra.** Note 1.

[4] An appeal was taken to the Supreme Court of Pennsylvania from the denial of the motion to quash the indictments. The appeal was quashed (January 15, 1965) for the reason that an order denying a motion to quash an indictment is an interlocutory order from which

At the time Lopinson was indicted (July 15, 1964) the law in Pennsylvania was that a challenge to the Grand Jury, or any member thereof, could be entered either before or after an indictment was returned, subject only to the limitation that it be entered before the plea to the indictment (see cases cited in the Opinion of the Supreme Court of Pennsylvania, 427 Pa. at 293, 234 A. 2d at 558; Petition p. 40). However, the record in this case is conclusive that, under the procedure existing at the time of the indictments, Lopinson was afforded every opportunity to exercise his rights of challenge and failed to produce any facts to support his allegations. A challenging of the array must be predicated on facts. "The courts will not permit a full scale investigation to be made of its jury panel until it is suspect." *United States v. Hoffa*, 349 F. 2d 20, 30 (6th Cir. 1965), *affirmed* 385 U. S. 293 (1966).

"Distinct evidence in support of the motion (to dismiss an indictment) must be offered. *Glasser v. United States*, 315 U. S. 60, 87, 62 S. Ct. 457, 86 L. Ed. 680 (1942). The evidence must be more than mere statements of counsel of what they hope they will be able to prove. *Frazier v. United States*, 335 U. S. 497, 503, 69 S. Ct. 201 (1948)." *Ibid.*

So far as this case is concerned, there was not the slightest indication that the Commonwealth of Pennsylvania failed "to furnish an unbiased body," assuming that "the Due Process Clause of the Fourteenth Amendment requires the State, having once resorted to a Grand Jury procedure, (to) . . . furnish an unbiased Grand Jury." *Beck v. Washington*, 369 U. S. 541, 546 (1962).

Due process was afforded to Lopinson. He was given "the opportunity to be heard." *Armstrong v. Manzo*, 380 U. S. 545, 552 (1965). The Pennsylvania Courts fully recognized the right to challenge and afforded Lopinson the opportunity to do so. Due process requires no more.

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no appeal lies until after conviction and sentence. The issue was raised in Lopinson's appeal from sentences and was fully considered and rejected by the Pennsylvania Supreme Court. 427 Pa. at 292-93, 234 A. 2d at 558-59.

Reference is made in the Petition to a case recently decided by the Supreme Court of Pennsylvania, *Commonwealth v. Dessus*, 423 Pa. 177, 224 A. 2d 188 (1966). Petitioner contends *Dessus* should have been applied to him. Dessus was indicted on May 10, 1966, which was *after* the effective date of Pennsylvania Rule of Criminal Procedure 203 (effective date, January 1, 1965).[5] This Rule provides that any challenge to the Grand Jury must be made "before the (grand) jurors are sworn unless opportunity did not exist prior thereto; in any event a challenge must be made before the bill of indictment is submitted to the Grand Jury. . . ." Since Dessus was indicted *after* the effective date of the Rule and was indicted on the very same day he was held for the Grand Jury, it was held that his "opportunity for challenging within a reasonable time the array or proving by legally competent evidence that one or more of the Grand Jurors should be disqualified for cause, did not exist before the bill of indictment was submitted to the Grand Jury and consequently defendant was effectively denied due process of law" (423 Pa. at 189, 224 A. 2d at 194-195).

In Lopinson's appeal to the Pennsylvania Supreme Court from his sentences, he raised the *Dessus* issue. The Court pointed out that at the time Lopinson was indicted Rule 203 was not in effect; the Pennsylvania law which was in effect permitted a challenge to the Grand Jury *either before or after* an indictment; Lopinson was afforded full opportunity to show that the Grand Jury was illegally impaneled or that any member thereof was unqualified to sit (427 Pa. at 293, 234 A. 2d at 558). He failed to present any facts in support of his claims and Due Process does not require that a movant be successful. Nor does the Constitution require retrospective operation of any given rule. *E.g., Johnson v. New Jersey*, 384 U. S. 719 (1966).

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[5] Lopinson was indicted on July 15, 1964.

II. THERE WAS NO DENIAL OF DUE PROCESS IN THE REFUSAL OF THE TRIAL COURT TO POSTPONE THE TRIAL BECAUSE OF ALLEGED PREJUDICIAL PRE-TRIAL PUBLICITY.

Petitioner complains that the pre-trial newspaper publicity concerning these crimes required an indefinite postponement of trial and that the refusal to grant a motion for such a continuance amounted to a denial of due process. The circumstances of the killings, the story Lopinson gave to the police on their arrival, and other events which developed thereafter, unquestionably created the background for considerable publicity. However, publicity, per se, is not the prime issue. Rather the real issue is whether unfair and prejudicial news comment in pending trials have so infected the community as to deprive a defendant of "a trial by an impartial jury free from outside influence." *Sheppard v. Maxwell*, 384 U. S. 333, 362 (1966). The samples of newspaper publicity, prior to the trial in the instant case, which petitioner has furnished in Appendix "E," do not remotely approach the publicity which occurred in *Sheppard v. Maxwell*. It was no different in substance and quality than the publicity which occurred in *Beck v. Washington*, 369 U. S. 541 (1962), wherein your Honorable Court said, "We cannot say the pretrial publicity was so intensive and extensive or the examination of the entire panel revealed such prejudice that a court could not believe the answers of the jurors and would be compelled to find bias or preformed opinion as a matter of law." *Id.* at 557.

The murders occurred on June 19, 1964. Lopinson was arrested July 15, 1964. In October 1964, Lopinson filed a motion for change of venue, alleging prejudicial publicity. The Commonwealth's answer denied that the publicity had been prejudicial, but, nevertheless, expressly stated that there was no objection to a change of venue. Lopinson

withdrew his motion shortly thereafter without further explanation.

The trial began on January 19, 1965, more than six months after the arrest. Prior to trial and again during the voir dire of prospective jurors, Lopinson's counsel moved for a continuance on the grounds that newspaper publicity rendered it impossible to secure a jury free of bias and prejudice. The motions were denied.

Extensive voir dire examinations were had of 250 prospective jurors. As each juror was selected he or she was immediately sequestered and remained so until the verdicts were recorded.

Two of the jurors selected had read nothing about the case; two others were not asked by counsel whether they had read anything; several had read news accounts superficially. Each juror selected clearly indicated that he had formed no opinion, would listen to the evidence with an open mind, was free from bias and would be unaffected by anything he or she might have read or heard about the case. *Not a single juror selected was challenged for cause,* and the record does not disclose any valid cause for challenge as to any juror selected. "The fact that petitioner did not challenge for cause any of the jurors so selected is strong evidence that he was convinced the jurors were not biased and had not formed any opinions as to his guilt." *Beck v. Washington,* 369 U. S. at 557, 558.

Petitioner here attempts to equate the present case with what occurred in *Sheppard v. Maxwell.*[6] As we have stated above there is not the slightest resemblance between the cases. In *Sheppard v. Maxwell* it is clear that there was not only massive newspaper publicity, but there existed editorial attacks on the defendant; his guilt was assumed; there was radio and television coverage of the trial; the courtroom was almost taken over by the news media. Your

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[6] 384 U. S. 333 (1966).

Honorable Court characterized the proceedings as having been conducted in a "carnival atmosphere."[7]

By comparison, Lopinson's trial was free from any prejudicial incidents. It was conducted in a proper and judicial atmosphere. The attempt to compare Lopinson's trial with that of Dr. Sheppard is without any justification.

Finally, on this issue, petitioner's reference to the holding in *Sheppard v. Maxwell* (Petition p. 23) is incomplete. Your Honorable Court said (384 U. S. at 362-363), "Of course there is nothing that proscribes the press from reporting events that transpire in the courtroom. But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, *or transfer it to another county not so permeated with publicity.*" (Emphasis added.)

Not only was the newspaper publicity in Lopinson's case not of a nature as to prevent a fair trial, or prevent the procuring of an impartial jury, but he had a fair trial by a fair and impartial jury and furthermore he was afforded an opportunity to obtain a change of venue to another county and voluntarily rejected it. His request for an indefinite continuance was without justification and the denial of that request was not even error let alone a violation of due process.

III. NONE OF PETITIONER'S CONSTITUTIONALLY GUARANTEED RIGHTS WERE VIOLATED BY VARIOUS TRIAL RULINGS.

Petitioner has referred to various matters which occurred during the trial wherein the trial Judge made rulings adverse to petitioner. These matters include rulings on admissibility of evidence, rulings during the voir dire exami-

[7] We have not undertaken to refer to many other clearly prejudicial occurrences noted in the opinion.

nation of jurors, and rulings on various other matters that occurred during the trial. Most of the matters complained of here were raised by petitioner in his appeal to the Supreme Court of Pennsylvania, considered and duly answered in the opinion of that Court sustaining the judgments of sentence. The petitioner here does not seriously contend that any one of the complaints included in this category standing alone could support an argument that petitioner was deprived of due process or reached constitutional stature. He seems to urge that "the aggregate add up to an unfair trial and a denial of due process" (Petition, footnote p. 3).

Your Honorable Court has had occasion frequently to state the extent of federal review of state criminal trials and when such review should be exercised.

It was said in *Rochin v. California,* 342 U. S. 165, 168 (1952):

> "Accordingly, in reviewing a State criminal conviction under a claim of right guaranteed by the Due Process Clause of the Fourteenth Amendment, from which is derived the most far-reaching and most frequent federal basis of challenging State criminal justice, 'we must be deeply mindful of the responsibilities of the States for the enforcement of criminal laws, and exercise with due humility our merely negative function in subjecting convictions from State courts to the very narrow scrutiny which the Due Process Clause of the Fourteenth Amendment authorizes.' Malinski v. People of State of New York, 324 U. S. 401, 412, 418. Due process of law, 'itself a historical product,' Jackman v. Rosenbaum Co., 260 U. S. 22, 31, is not to be turned into a destructive dogma against the States in the administration of their systems of criminal justice."

See *Buchalter v. New York,* 319 U. S. 427, 429, 430 (1943).

A more recent discussion by this Court of the principle

involved can be found in *Spencer v. Texas*, 385 U. S. 554, 562-64 (1967).

In *Lisenba v. California*, 314 U. S. 219, 236 (1941), Your Honorable Court, in determining the application of the Due Process Clause to a State trial, said,

> "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevent a fair trial."

In the light of these principles we reach the various rulings complained of:

(a) The admission in evidence of testimony alleged to be hearsay.

The Pennsylvania Supreme Court noted that the few instances referred to "had no influence on the verdict" and must be deemed harmless error. The Court further observed, "Some error in a protracted trial, such as this, will unfortunately occur, but we have consistently ruled that if the error did not deprive the defendant of the fundamentals of a fair trial, we will not reverse the conviction" (427 Pa. at 307, 234 A. 2d at 565).

Federal law as to harmless error is clear. "Where it is made to appear affirmatively, as here, that the alleged error could not affect the result, such errors may be disregarded, even in the review of criminal trials." *Brown v. Allen*, 344 U. S. 443, 460 (1953). Of course we are not here dealing with the harmless error standards as to specific constitutional provisions. See *Chapman v. California*, 386 U. S. 18 (1967).

(b) The alleged limitation of examination of jurors on their voir dire.

The record does not support this complaint. A total of 250 individuals were examined before twelve jurors and two alternates were selected. The examination lasted from January 19 to January 28, 1965. There was little restriction on the scope of the examination. Where there was limitation by the trial Judge it was in full compliance with Pennsylvania law and federal rulings.

In *Commonwealth v. McGrew*, 375 Pa. 518, 525, 526, 100 A. 2d 467, 470 (1953), it was said,

> "While considerable latitude should be permitted on a voir dire, the inquiry should be strictly confined to disclosing qualifications or lack of qualifications of a juror and whether a juror has formed a fixed opinion or may be otherwise subject to disqualification for cause . . .
>
> It is also well settled that the scope of the voir dire examination rests in the sound discretion of the trial Judge and his decisions, even in a challenge for cause, will not be reversed in the absence of palpable error."

This is also federal law. *E.g., United States v. Sferas*, 210 F. 2d 69, 75 (7th Cir. 1954), certiorari denied, 347 U. S. 935 (as to the qualifications of a juror resting in the discretion of trial Judge); *United States v. Bowe*, 360 F. 2d 1, 9 (2nd Cir. 1966), certiorari denied, 385 U. S. 961 (as to discretion of trial Judge in the conduct of voir dire examination).

(c) The rulings of the trial Judge as to conduct of the witness, Phelan, while testifying.

Two complaints relate to this witness: First, that while testifying for the Commonwealth and during cross-exami-

nation he wore sunglasses and would not remove them,[8] and, second, his refusal to answer several questions put to him on cross-examination. Phelan's direct examination covers 41 pages of the trial transcript as printed; his cross-examination covered 504 printed pages. The cross-examination was rigid, exhaustive and frequently repetitive. The fact that Phelan refused to remove the sunglasses while testifying in chief was repeatedly brought to the jury's attention during trial and in counsel's summation. As the Pennsylvania Supreme Court pertinently noted in its opinion (427 Pa. at 304, 234 A. 2d at 564), Phelan's actions, undoubtedly, were more helpful than harmful to defendant's case, especially where the trial judge in his charge referred to the incident and permitted the jury to draw inferences, unfavorable to the witness' credibility, from his refusal to remove the glasses. It is difficult to see where petitioner can claim to have been prejudiced and surely there is no constitutional right here involved.

For a similar reason, Phelan's refusal to answer several questions put to him did not constitutionally infringe upon Lopinson's right to cross-examine. Many of the questions which Phelan, at first, refused to answer, were eventually answered in response to subsequent questioning. When this extensive record is thoroughly examined, it is discovered that only two facts were undisclosed at the conclusion of Phelan's cross-examination, (1) where he purchased dope pills which he admitted using, and (2) the specific location where he and Lopinson fire-tested the murder weapons after they were purchased and before the killings. It appears to be clear that neither fact has any bearing on Phelan's credibility and may well have been ruled out as beyond the scope of cross-examination. It cannot be argued that cross-examination of Phelan was unreasonably limited. Moreover, "the scope of cross-examination lies pretty largely within the discretion of the Trial

[8] When he testified later in rebuttal he appeared without the sunglasses.

Judge." *United States v. Toner*, 173 F. 2d 140, 144 (3rd Cir. 1949). These complaints, obviously, do not involve federal constitutional rights.

(d) The testimony of rebuttal witnesses as to reputation of Lopinson.

Lopinson not only testified in his own behalf but also called witnesses to testify as to his good reputation as a law-abiding citizen. It is clear that by testifying Lopinson placed his credibility in issue and by calling the witnesses he put his reputation in issue.

> "The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him. The prosecution may pursue the inquiry with contradictory witnesses to whom that damaging rumors, whether or not well-grounded, were afloat—for it is not the man that he is, but the name that he has which is put in issue."

Michelson v. United States, 335 U. S. 469, 479 (1948).

That some of the witnesses the prosecution called in rebuttal characterized Lopinson's reputation as that of a "liar," or "scoundrel" was part of the "price" Lopinson was required to pay by putting his alleged good name in issue. If the two rebuttal witnesses embellished their testimony, so did some of the witnesses called by the defense. Certainly this did not constitute infringement of Fourteenth Amendment rights, especially where the Pennsylvania Supreme Court evaluated the complaint and determined that the failure of the trial judge, under all circumstances, to limit the answers of the witnesses was "not of such moment as to require a new trial."

(e) The quashing of a subpoena duces tecum requested by petitioner.

During the course of this lengthy trial Lopinson's attorneys served upon the Police Commissioner of Philadelphia and upon the District Attorney subpoenas duces tecum calling for the production "of all records, tapes, and/or transcripts thereof and/or reports and transcripts of telephone conversations emanative from or to (a certain telephone number)...."

The District Attorney moved to quash the subpoenas. A side-bar hearing was held. Lopinson's counsel reiterated that "I want all tapes, transcripts, et cetera, of any conversations that they have in their possession emanating from or to the phone of Nate Lopinson (petitioner's father)."

During the hearing no information was furnished to the trial judge as to the purpose and object of the subpoenas. It was not established that any such records existed; it was clearly not indicated that petitioner intended to use such material as evidence for the defense. The trial judge therefore quashed the subpoenas.

The doctrine of discovery is a stranger to criminal procedure. This is Pennsylvania law. *E.g., Commonwealth v. Caplan*, 411 Pa. 563, 192 A. 2d 894 (1963). "At the very least, a defendant should be required to present exceptional circumstances and compelling reasons." *Id.* at 567, 192 A. 2d at 896. None were shown here. Even under Rule 17(c), Federal Rules of Criminal Procedure, an application to compel the government to produce evidence, the equivalent of the traditional subpoena duces tecum, is granted "only where in the discretion of the court, it is necessary that he do so in order to make use of the material as evidence." *United States v. Murray*, 297 F. 2d 812, 821 (2nd Cir. 1962), cert. denied, 369 U. S. 828.

"An application for relief under these rules (Rule 16

and Rule 17(c)) is a matter within the sound discretion of the court, and the controlling test is whether there was an abuse of discretion." *Gevinson v. United States*, 358 F. 2d 761, 766 (5th Cir. 1966), cert. denied, 385 U. S. 823.

Tested by federal standards, it is obvious that the subpoena was intended to fish for evidence, and, more importantly, no necessity was shown. The court's exercising of its discretionary power presents no federal question.

(f) The alleged withholding of evidence.

Petitioner here, in his statement of Questions Presented (No. 9, at p. 5), in his Statement of the Case (at p. 15), and in his Reasons for Granting the Writ (at p. 28) refers to alleged withholding by the prosecution of evidence which "may have been helpful to the accused." Petitioner stated (p. 15) that this issue was raised on appeal to the Supreme Court of Pennsylvania and that in its opinion the Supreme Court "makes no mention or reference to this error."

We have reexamined petitioner's Brief submitted to the Supreme Court of Pennsylvania on his appeal. It consisted of 167 printed pages. In his brief Lopinson argued 23 different issues. Lopinson did not complain to the Supreme Court of Pennsylvania, as he does here, that statements of witnesses or evidence "which may have been helpful to the accused" were withheld from petitioner. Nor does he even specify here what statements or evidence are alleged to have been withheld, except a vague assertion that if he had been permitted to inspect "all" records in possession of the police he might have come across some material that might have been helpful to him. *The clear fact is that every statement taken by the police and prosecuting authorities of every witness, if it existed, and specifically of the witness, Phelan, was made available to and furnished to the defense.* There is no semblance of violation of the principles set forth in *Jencks v. United*

States, 353 U. S. 657 (1957), or in cases like *Brady v. Maryland*, 373 U. S. 83 (1963). The prosecution in the instant case withheld no evidence from Lopinson which would have tended to help his defense and it is obvious from the vague allegations in his present petition that he can point to no such violation of his rights.

(g) The exhibition of color slides.

During the examination of a witness, Dr. Joseph E. Campbell, a forensic pathologist employed in the office of the Medical Examiner of the City of Philadelphia, called by the State, to testify as to various matters, use was made of certain color slides made from photographs taken at the scene of the killings while the bodies of the two victims were in the positions where the police found them. These photographs were exhibited for the purpose of enabling Dr. Campbell to explain to the jury certain aspects of his testimony. Before the photographs were exhibited Dr. Campbell was asked:

"Q. Doctor, in your testimony would the showing of slides to the Jury aid you in giving your testimony?"

He replied:

"A. Yes." (Record 2882a).

The photographs were used to demonstrate the location of the bodies, the position of the bodies in relation to other objects in the office, the location, nature, character and extent of the wounds, the point of entry of the bullets and the severity of the assaults (Record 2883a-2884a). This evidence was material because Lopinson denied that the killings were deliberate assassinations performed at his behest.[9]

[9] It will be recalled that Phelan testified that after the shootings Lopinson came down to the basement office, was not satisfied that the victims were dead and commanded Phelan to again shoot each of the victims twice in their heads.

Under the strict supervision of the trial judge a number of slides were briefly exhibited on a four foot screen in a fully lighted courtroom (Record 2896a). The exhibition of each slide varied in time from 32 seconds to 93 seconds (Record 2901a et seq.). The point which Dr. Campbell desired to make as to each slide was quickly stated by him and the slide was then removed.

It is the law of Pennsylvania that color slides showing the body of deceased may be exhibited to the jury "to show the nature of the wounds and the severity and violence of the assault." *Commonwealth v. Raymond*, 412 Pa. 194, 206, 194 A. 2d 150, cert. denied, 377 U. S. 999 (1963).

The only limitation is that there be no "overuse;" the fact "that the exhibits were not pleasant to the eye does not require their exclusion." *Ibid.*

As recently as January, 1968, the Supreme Court of Pennsylvania said in *Commonwealth v. Powell*, 428 Pa. 275, 278, —— A. 2d —— (1968),

> "... (T)he admission of photographs exhibiting the body of a deceased in homicide cases is primarily within the discretion of the trial judge. Unless there is a flagrant abuse of discretion, this Court has been loath to conclude that reversible error exists. . . . We are of the opinion that the proper test to be applied by a trial court in determining the admissibility of photographs in homicide cases is whether or not the photographs are of such essential evidentiary value that their need clearly outweighs the likelihood of inflaming the minds and passions of the jurors."

Federal law is in accord. See, e.g., *Maxwell v. United States*, 368 F. 2d 735, 740 (9th Cir. 1966). The complaint as to the exhibition of the slides was made to the State Courts in the instant case and was not sustained. This does not present a federal question. The issue is one of a state court interpreting its rules of evidence. Your Honorable Court said recently in *Spencer v. Texas*, 385 U. S. 554, 563 (1967),

> ". . . (T)his Court was not the best forum for developing rules of evidence and would, therefore, not proscribe the long-standing practice at issue. A fortiori, this reasoning applies in the cases before us today which arise not under what has been termed the supervisory power of this Court over proceedings in the lower federal courts . . ., but in the form of a constitutional claim that would require us to fashion rules of procedure and evidence in state courts."

Your Honorable Court further said (at 563-564),

> "Cases in this Court have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial. . . . But it has never been thought that such cases establish this Court as a rule making organ for the promulgation of state rules of criminal procedure."

Pennsylvania Courts evaluated the propriety of the use of color slides in the present case and concluded that they were properly exhibited to the jury.[10] No issue of due process is presented.

IV. THE EXAMINATION OF PROSPECTIVE JURORS AS TO THEIR CONSCIENTIOUS SCRUPLES AGAINST CAPITAL PUNISHMENT.

We are cognizant that on January 15, 1968, Your Honorable Court granted certiorari in two cases (*Witherspoon v. Illinois* and *Bumpers v. North Carolina*) to consider the question whether state law which provides, or permits, challenges for cause, in a capital case, of prospective jurors who were opposed to, or had conscientious scruples against capital punishment deprives defendant of a jury which

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[10] The photographs, copies of which appear in the trial record, were not seen or taken out by the jury.

fairly represents a cross-section of the community, and assured the state of a jury whose members were partial to the prosecution on the issue of guilt or innocence in violation of a defendant's rights under the Sixth and Fourteenth Amendments.

Pennsylvania has consistently held that such an inquiry does not violate a defendant's constitutional rights.

> "The purpose (of such inquiry) was not to obtain information as to the verdict which the juror would render upon the production of certain evidence, but whether he could consistently render a verdict such as the law contemplated, if the testimony established guilt beyond a reasonable doubt." *Commonwealth v. Bentley*, 287 Pa. 539, 546, 135 A. 310, 313 (1926).
>
> "It is essential in the trial of cases, particularly where there is a possibility of a death penalty, to secure jurors who are free from prejudices or fixed opinions with respect to the matters in issue, in order that an impartial verdict may be reached." *Commonwealth v. Pasco*, 332 Pa. 439, 445, 2 A. 2d 736 (1938).

This is also the ruling in other states. It is the law in federal courts: *E.g., Turberville v. United States*, 303 F. 2d 411, 420 (D. C. Cir. 1962). Your Honorable Court said in *Logan v. United States*, 144 U. S. 263, 298 (1892):

> "As the defendants were indicted and to be tried for a crime punishable with death, those jurors who stated on voir dire that they had 'conscientious scruples in regard to the infliction of the death penalty for crime' were rightly permitted to be challenged by the government for cause. A juror who has conscientious scruples on any subject, which prevents him from standing indifferent between the government and the accused, and from trying the case according to the law and the evidence is not an impartial juror."

We cannot foresee what view Your Honorable Court will adopt in considering the cases wherein certiorari has been

granted. But one fact stands out clearly. Pennsylvania (and other states) have followed a legal principle which bears the imprimatur of Your Honorable Court for almost a century. Whatever may result from a reconsideration of this issue, it can be assumed, with reasonable certainty, that any newly declared principle will not be held to apply retroactively to cases tried before it was enumerated.

Considering the reliance which the courts have placed on the "virtually unanimous weight of authority" including that of Your Honorable Court, on this subject, application of any new principle (not even declared) to trials fully completed "would seriously disrupt the administration of our criminal laws." *Stovall v. Denno*, 388 U. S. 293, 300 (1967); *Johnson v. New Jersey*, 384 U. S. 719, 731 (1966).

V. THE IMPOSITION OF THE DEATH PENALTY BY A STATE COURT IN A PROPER CASE DOES NOT VIOLATE ANY CONSTITUTIONAL PROVISIONS.

Petitioner seeks to have Your Honorable Court consider whether state law which permits imposition of the death penalty for murder in the first degree violates federal constitutional rights. He refers to Eighth Amendment proscription against "cruel and unusual punishments" which he says should be incorporated with the Fourteenth Amendment's requirement that no state shall "deprive any person of life . . . without due process of law."

He also refers to the additional requirement of the Fourteenth Amendment that a state may not "deny to any person within its jurisdiction the equal protection of the laws."

We first observe that the due process provision does not prohibit a state from depriving a person of life. In fact, it recognizes the propriety of the death penalty because it expressly states that no person shall be deprived of his life "without due process of law." The validity of the imposition of the death penalty depends, therefore, solely on the

question whether a defendant received due process. Unless the Fourteenth Amendment be further amended so as to declare that a state may not impose the death penalty in any case, it is clear that the very Fourteenth Amendment which petitioner relies upon is against his present argument. The further argument predicated on the "equal protection of the laws" provision is based on the contention that the imposition of the death penalty on some defendants and the imposition of life imprisonment on others denies equal protection. It is obvious that so long as a sentence is within the maximum provided by law, a defendant may not complain of unequal protection merely because other persons, in justifiable cases, may receive less than the maximum sentence. Such a contention as is here advanced was recently held to be "frivolous." *Overstreet v. United States*, 367 F. 2d 783 (5th Cir. 1966).

Moreover, Your Honorable Court expressly said, "So long as the law applies to all alike, the requirements of equal protection are met." *Louisiana ex rel. Francis v. Resweber*, 329 U. S. 459, 465 (1947).

All persons charged with murder in Pennsylvania, if convicted of murder in the first degree, may be sentenced to death or receive life imprisonment depending on the facts and circumstances of each case as determined by the jury after it rendered its verdict of guilty. This petitioner received equal treatment with all other persons convicted of murder.

This brings us to the final argument, that the imposition of the death penalty, per se, constitutes a cruel and unusual punishment and, by incorporation with the Fourteenth Amendment should be declared a deprivation of due process.

It is unquestioned that this has never been so declared in any reported case, state or federal.

Your Honorable Court had frequently been importuned to declare the death penalty to be violative of the constitutional on various grounds, especially on the theory that

it constitutes a cruel and unusual punishment. Frequently this has been urged in behalf of defendants who had been convicted of crimes other than murder. This Court has consistently refused to find any constitutional proscription of the death penalty.

We cite a few of these cases: *Wilkerson v. Utah,* 99 U. S. 130 (1878); *In Re Kimmler,* 136 U. S. 436, 447 (1890); *Weems v. United States,* 217 U. S. 349, 371 (1910); *Trop v. Dulles,* 356 U. S. 86 (1958).

In *Trop v. Dulles,* Your Honorable Court said (356 U. S. at 99),

> "Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful—the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty."

This being the present conception there is no need to argue the appropriateness of the death penalty in the instant case, where we have a cold-blooded assassination of two persons, the wife and business partner of this petitioner, for the most sordid motives.

VI. THE STATEMENTS GIVEN BY PETITIONER TO THE POLICE AT THE SCENE OF THE KILLINGS AND SUBSEQUENTLY AT THE HOSPITAL WERE ADMISSIBLE AGAINST HIM.

When the police arrived at the scene of the killings they found petitioner with a bullet wound in his thigh. He informed the police that the restaurant had been held up by two unknown men, who shot the victims during the robbery and who also shot petitioner. Petitioner was removed to a nearby hospital where, while petitioner was receiving

first aid treatment, other police officers interrogated him for the purpose of obtaining a description of the two alleged hold-up men. Since petitioner, at his trial, frankly admitted that his story was a falsehood and was pre-arranged by him and Phelan, his earliest statements to the police were, of course, introduced in evidence at trial. It is now contended that these oral statements violated petitioner's rights declared in *Miranda v. Arizona*, 384 U. S. 436 (1966).

This case was tried long before the effective date of *Miranda* and thus *Miranda* is not applicable. *Johnson v. New Jersey, supra.* Petitioner was not a suspect, either at the scene or in the hospital; he was not in police custody nor even detained by any police order. It is patently clear that the *Miranda* procedures apply only "when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning. . . ." *Miranda* at 478.

Also it is said in *Miranda* (at 477-78), "General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present. . . . Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence."

We strongly urge that even were *Miranda* applicable to this case, petitioner's complaints here are without the slightest merit.

A further contention, here made, that because the police officers suspected that petitioner might not have told the truth concerning the unknown hold-up men when they spoke to him at the hospital made him a "suspect" and therefore entitled to full *Miranda* warnings prior to questioning is answered (in addition to the fact that the trial was pre-*Miranda*) by the observation that petitioner was

not in custody, that police were engaged in their legitimate function of fact-finding and that the statements volunteered by petitioner were given freely, and as was learned later, in accordance with a calculated plan.

VII. THE DENIAL OF POST-TRIAL MOTIONS WAS PROPER AND RAISES NO CONSTITUTIONAL ISSUES.

After petitioner's conviction, motions for a new trial and in arrest of judgment were filed without specifying specific reasons other than the usual pro forma ones. As is the practice in Pennsylvania, petitioner's counsel was given ample time to specify all alleged errors after the trial transcript was filed. Petitioner's counsel then filed 57 additional reasons in support of his motions and argument was heard before the court en banc. Thereafter, and before the court rendered its decision, petitioner filed another petition to enter supplemental reasons in support of his post-trial motions, alleging that petitioner's counsel had "medical proof" of the incompetency of the state's principal witness, Phelan. Phelan's competency as a witness was the subject of considerable investigation prior to and during the trial. His competency was conclusively established. In their post-trial petition, stating that counsel had "medical proof" of Phelan's incompetency, nothing was furnished to indicate what the proof consisted of. In view of the extensive medical testimony presented to the court during the trial as to Phelan's competency as a witness, which was established beyond any doubt, what "medical proof" could petitioner have had other than the possible testimony of another physician who might have expressed an opinion contrary to those given at trial? Denial of the motion under these circumstances by a court which heard extensive medical testimony on the subject was clearly within its discretion and surely presents no constitutional question.

CONCLUSION.

It is respectfully requested that the petition for a writ of certiorari to the Supreme Court of Pennsylvania be denied for the foregoing reasons.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1967

No. 1095

JOHN J. GANNON, Individually and as President of INDEPENDENT WATCHMEN'S ASSOCIATION,

Petitioner,

—against—

ENRIQUE NAVARRO, Individually and as President of LOCAL 2 of INTERNATIONAL UNION OF POLICE AND PROTECTION EMPLOYEES-INDEPENDENT WATCHMEN'S ASSOCIATION, and on Behalf of All Members Similarly Situated,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	PAGE
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Statute Involved	3
Statement	3
Reasons for Granting the Writ	4
Conclusion	9
Appendix:	
Opinion, Court of Appeals	App. 1
Judgment and Order, Court of Appeals	App. 18

Table of Cases Cited

Calhoon v. Harvey, 379 U.S. 134 (1964)	4, 5
Coleman v. Brotherhood of Railway and Steamship Clerks, 340 F.2d 206 (2nd Cir. 1965)	5, 6
Gurton v. Arons, 339 F.2d 371 (2nd Cir. 1964)	5, 6, 7
Longshoremen v. Marine Trade Association, 389 U.S. 64 (1967)	8
Robins v. Rarbach, 375 F.2d 929 (2nd Cir. 1963)	5

PAGE

Yanity v. Benware, 276 F.2d 197 (2 CA April, 1967) 6, 7

Tucker v. Shaw, —— Fed. 2d —— (2nd Cir. 1967) 7

OTHER AUTHORITIES CITED

Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. 401 et seq.:

§412 2

§411(a)(1) 2, 3, 4

§411(a)(2) 2, 3, 6, 7

28 U.S.C. 1254(1) 2

IN THE

Supreme Court of the United States

October Term, 1967

No. ———

JOHN J. GANNON, Individually and as President of INDEPENDENT WATCHMEN'S ASSOCIATION,

Petitioner,

—against—

ENRIQUE NAVARRO, Individually and as President of LOCAL 2 of INTERNATIONAL UNION OF POLICE AND PROTECTION EMPLOYEES-INDEPENDENT WATCHMEN'S ASSOCIATION, and on Behalf of All Members Similarly Situated,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States

Petitioner is John J. Gannon, individually and as president of Independent Watchmen's Association.

Respondent is Enrique Navarro, individually and as president of Local 2 of International Union of Police and Protection Employees-Independent Watchmen's Association, and on behalf of all members similarly situated.

Petitioner prays that a writ of certiorari issue to review a judgment and order of the United States Court of Appeals for the Second Circuit entered in the above entitled

proceeding on November 20, 1967 which order affirmed an order of the United States District Court for the Southern District of New York, granting the motion of respondent for a preliminary injunction under Section 102 of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 412, restraining defendants from interfering with meetings of respondent's local union.

Opinion Below

The opinion of the Court of Appeals, per Lumbard, Ch. J., is reported at —— F.2d —— and may be found in the appendix at page 1.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1). The order of the Court of Appeals was entered on November 20, 1967, and may be found in the appendix at page 18.

Questions Presented

1. Whether the guaranty of the right in §101 (a)(1) and (2) of the Labor Management Reporting and Disclosure Act, 29 U.S.C. 401 *et seq.* to meet, assemble and discuss matters properly before a union meeting justifies injunctive relief against threatened supervision of a local union's meeting by representatives of a parent labor organization short of imposing a trusteeship.

2. Should the Court decide the first question in the affirmative, may such injunctive relief be had when the issues are presented only in general terms, there is no factual development of any specific threatened danger to any right to vote or hold a meeting and the only specific evidence in

support of the application is a letter written to all local union members containing only reasoned discussion without threats of discipline.

Statute Involved

The statute involved is the Labor Management Reporting and Disclosure Act, 29 U.S.C. 401 et seq. particularly section 411 which appears in footnote 1 of the Opinion and may be found in the appendix at pages 2-3.

Statement

In a letter to the members of Local 2 dated February 9, 1967, petitioner indicated awareness of "problems which have existed within your local," referred to calls from rank and file members of the local and the International's desire to furnish information. The problems were stated to be the desire of some members to disaffiliate from the international, attempts to change the welfare insurer and the local's counsel. Provision was made for international officers to preside at the meeting. The letter concluded, "The International urges you to attend the Local 2 meeting called for February 19, 1967 and take proper steps to protect your interests."

Nowhere in the papers is there any statement that any particular matters were to be discussed or presented for action at the regular meeting of February 19, 1967. Nor do any threats by defendant of discipline or any other kind appear.

Article IX of the Constitution of the I.W.A. gave the international president "other and further powers in addition to those herein enumerated and shall perform such other and further duties as are usual to his office and as are

performed by the president in accordance with the practices of the I.W.A." Such practices are shown to have included taking action to have international officers preside at a local's meeting. This had been done during 1965 in Local 2.

A temporary restraining order was granted in the District Court on February 16, 1967 and a Court of Appeals judge refused to vacate such temporary restraining order on February 17, 1967. The meeting was held on February 19, 1967 without international officers in attendance and was presided over by local officers. The preliminary injunction was heard thereafter and granted after argument. The Court of Appeals affirmed granting of the preliminary injunction.

Reasons for Granting the Writ

1.

The Court of Appeals holding is "that the LMRDA secures the right of union members to meet without interference from the international union except where the parent organization acts in accordance with lawfully established procedures to institute a trusteeship over the local union." This holding, characterized by the Court of Appeals as "an important question under the Labor Management Reporting and Disclosure Act", creates a situation where a parent body is prohibited from acting toward its locals except in the most drastic manner. Persuasion and orderly discussion are apparently outlawed if exercised by a parent union. On the other hand the parent is encouraged to take action to prevent almost completely the exercise of almost any local autonomy.

This Court has held, *Calhoon* v. *Harvey*, 379 U.S. 134 (1964), that the 101 (a) (1) guarantees do not vest in mem-

bers any right to unrestricted nomination to union office. As glossed in the very court of which review is sought, *Calhoon* mandates that the Labor Management Reporting & Disclosure Act provides no jurisdiction for United States Court to interfere unduly in union affairs. Rights are given by the statute to union members, but these rights must be directly attacked to justify court interference. *Cf. Gurton* v. *Arons*, 339 F.2d 371 (2nd Cir. 1964); *Robins* v. *Rarbach*, 375 F. 2d 929 (2nd Cir. 1963); *Coleman* v. *Brotherhood of Railway and Steamship Clerks*, 340 F. 2d 206 (2nd Cir. 1965).

Judge Hays in *Gurton* expressed the proper construction of *Calhoun* when he said (339 F. 2d at 374-375):

> "But the guaranty of the equal right to vote is surely not a general commission for the federal courts to review the constitution and by-laws of the union. As long as no claim is made that provisions of the constitution and by-laws are being applied in such a way as to deny equality in voting, there is nothing in Section 101 which authorized consideration of those documents.
>
> • • •
>
> "The provisions of the L.M.R.D.A. were not intended by Congress to constitute an invitation to the courts to intervene at will in the internal affairs of unions. Courts have no special expertise in the operation of unions which would justify a broad power to interfere. The internal operations of unions are to be left to the officials chosen by the members to manage those operations except in the very limited instances expressly provided by the Act. The conviction of some judges that they are better able to administer a union's affairs than the elected officials is wholly without foundation. Most unions are honestly and efficiently administered

> and are much more likely to continue to be so if they are free from officious intermeddling by the courts. General supervision of unions by the courts would not contribute to the betterment of the unions or their members or to the cause of labor-management relations."

See also *Coleman* v. *Brotherhood of Railway and Steamship Clerks,* 340 F. 2d 206 at 208 (2nd Cir. 1965); *Yanity* v. *Benware,* 376 F. 2d 197 (2 CA April, 1967).

No matter is shown to have been before the local to be voted on so that the right to vote equally or otherwise could not have been interfered with. Nor did any action of defendant indicate even any desire to interfere with any member's right to vote. The members were urged only "to attend" and "take proper steps to protect your interests". The only action taken by defendant was to furnish information and to provide for an orderly discussion by having international officers preside in accord with past practice: Perhaps this action was beyond the specific powers granted in the union constitution (it was not specifically prohibited), but the observance of the union constitution was not before the Court, only specific rights granted by statute and not shown to have been infringed.

The legislative history of LMRDA as set forth in the opinion below gives very little help on whether the question of who shall preside at a local meeting is one of the rights protected. The Court below recognized that the right of assembly protected by the statute was chiefly concerned with the right to confer outside regular meetings rather than with conduct at meetings. The Court below admits that in applying section 101 (a) (2) guarantees to this case it acts without any express indication of congressional

intent. It must be added that it likewise acts without any clear language in the act to this effect.

The Second Circuit previously held in *Yanity, supra,* that the right to meet and assemble freely under section 101 (a) (2) of the Act does not create a right of the membership to have meetings called. In this case it has held that the statutory right "necessarily encompass the right to assemble, consult and decide matters of concern to the local union without the inhibiting presence and control of international officials." A local member thus has a right to a particular presiding officer at a meeting which he could not have ordered called.

The Second Circuit has held in *Tucker* v. *Shaw,* —— Fed. 2d —— (1967), that when rights of the local against its officers were in question, a clear conflict arose justifying the exclusion of local counsel from the meeting. A similar situation might well have been presented at the February 19th meeting and dispassionate, disinterested international officers presiding might have been preferable to local officers who possibly would come under attack if there were really free discussion.

In *Gurton, supra,* the Second Circuit upheld the action of the executive board in setting aside a vote taken at a meeting without finding any violation of a member's statutorily guaranteed rights.

These examples as contrasted with the present case show what fine lines must be drawn as to what is and what is not interference in union affairs by the courts. A much sounder rule would be to prohibit interference by the courts except when it is shown that the statutory right of a member is being directly interfered with and thus avoid the necessity of hair line distinctions.

2.

Running through the court's opinion are various pejorative characterizations of defendant's acts. It is stated, among other instances, that "the Local meeting is taken over by the International". (Appendix 11) Again "the officers of Local 2 may not be shunted aside" (Appendix 11). The "elected officers of the local" are contrasted to "hostile outsiders" (Appendix 12). The object of the proceeding is said to be that "that the members be free from inhibiting controls imposed on their meeting from without" (Appendix 14).

All these epithets, if correct, might justify court action. They seem inflated out of all proportion when the only action involved was the writing of a letter which sought merely to stimulate (rather than suppress) discussion. The court's misunderstanding of what took place is due to the fact that there is before it no proof of any act whatsoever on the part of defendant except the writing of a letter. The rest of the papers are made up only of conclusions without any evidentiary matter in support thereof.

The Court has this term in *Longshoremen* v. *Marine Trade Association*, 389 U.S. 64 (1967) reversed a decree of injunction as too vague to be understood. Certainly it should not permit an injunction enforceable by contempt to stand when it is based on merely conclusory language which does not set forth any specific act complained of, and into which language horrendous meanings may be read that quite possibly are not supportable.

CONCLUSION

For the reasons set forth above it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

WILFRED L. DAVIS
Counsel for Petitioner

APPENDIX

Opinion, Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 79—September Term, 1967.

(Argued October 9, 1967 Decided November 20, 1967.)

Docket No. 31444

ENRIQUE NAVARRO, Individually and as President of LOCAL 2 of INTERNATIONAL UNION OF POLICE AND PROTECTION EMPLOYEES — INDEPENDENT WATCHMEN'S ASSOCIATION, and on Behalf of All Members Similarly Situated,

Plaintiffs-Appellees,

—v.—

JOHN J. GANNON, Individually and as President of INDEPENDENT WATCHMEN'S ASSOCIATION,

Defendants-Appellants.

Before:

LUMBARD, *Chief Judge,*
SMITH and FEINBERG, *Circuit Judges.*

Appeal from order of the United States District Court for the Southern District of New York, Charles M. Metzner, *J.*, granting motion of plaintiffs for a preliminary injunction under Section 102 of the Labor Management Reporting and Disclosure Act of 1959, 29 U. S. C. §412, restraining

defendants from interfering with meetings of plaintiff's local union.

Affirmed.

CHARLES P. AXELROD, New York, N. Y. (Robert M. Heller and Philip Pierce, Heller & Pierce, New York, N. Y., on the brief), *for plaintiffs-appellees.*

JEROME H. SHAPIRO, New York, N. Y. (Wilfred L. Davis and Joy M. Holz, New York, N. Y., on the brief), *for defendants-appellants.*

LUMBARD, *Chief Judge:*

This appeal raises an important question under the Labor Management Reporting and Disclosure Act, 29 U. S. C. §401 et seq.: whether the guaranty of the right in Section 101(a)(1) and (2)[1] of the Act to meet, assemble

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[1] 29 U. S. C. §411(a)(1):

"Equal rights.—Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws."

29 U. S. C. §411(a)(2):

"Freedom of speech and assembly.—Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided,*

and discuss matters properly before a union meeting justifies injunctive relief against threatened supervision of a local union's meeting by representatives of a parent labor organization. We hold that the LMRDA secures the right of union members to meet without interference from the international union except where the parent organization acts in accordance with lawfully established procedures to institute a trusteeship over the local union. We therefore affirm the order of the Southern District which granted the motion of appellees for a preliminary injunction.

The plaintiff, Enrique Navarro, as an individual member and as President of Local 2 of the International Union of Police and Protection Employees—Independent Watchmen's Association, brought this action under Section 102 of the LMRDA, 29 U. S. C. §412[2] against the defendants, John J. Gannon, individually and as President of the Independent Watchmen's Association, an international union of which Local 2 is an affiliated local.

The plaintiff sought an injunction restraining the defendants from interfering with the meeting of Local 2

That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations."

[2] 29 U. S. C. §412:

"Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located."

scheduled for February 19, 1967 on the ground that such interference would be in violation of the LMRDA, the constitution of the I. W. A. and the bylaws of Local 2;[3] in particular, plaintiffs sought to restrain defendants from assuming control of the Local meeting, from barring Local counsel from the meeting, from interfering with the right of members to express views on matters properly before the meeting, and from interfering with the right to have Local officers preside over the meeting. Plaintiffs also sought a declaratory judgment that the threatened acts described in a letter of February 9, 1967 to the members of Local 2 violated the I. W. A. constitution, the bylaws of Local 2, the provisions of 29 U. S. C. §411, and the Constitution of the United States.

The letter of February 9, 1967 was signed by James J. McFaun, Secretary-Treasurer of the I. W. A. and was written at the direction of the defendant. In the letter to members of Local 2, defendant indicated an awareness of "problems which have existed in your Local," in particular the desire of some members to disaffiliate from the I. W. A., the action of the Local in replacing its counsel, the attempt made within the Local to change the insurance company responsible for administering the welfare program. The letter then announced that Gannon, the International president, had directed that the International vice-president attend and preside over the Local meeting, that the International secretary-treasurer and Sergeant-at-Arms assist him, and that no counsel be permitted to

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[3] Although an officer of the union, plaintiff may bring this action to protect his secured rights as an individual member. *Salzhandler* v. *Caputo*, 316 F. 2d 445 (2 Cir. 1963); *Grand Lodge* v. *King*, 335 F. 2d 340 (9 Cir. 1964), cert. denied 379 U. S. 920.

attend.[4] On February 17, 1967 Judge Motley issued an order temporarily restraining the I. W. A. from such interference. The next day, February 18, 1967, Judge Anderson denied the defendant's application to stay the order. After a hearing on March 14, Judge Metzner, in an order entered on May 3, 1967, granted the plaintiff's motion for a preliminary injunction and denied defendant's cross-motion to dismiss the action.

The order issued by Judge Metzner[5] enjoined the defendants from assuming control of any meetings of Local 2;

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[4] In the letter to the members of Local 2, defendants directed that:

"1. First Vice-President Kirby attend your next stated meeting called for February 19, 1967 and act as chairman of such meeting.

2. Secretary-Treasurer McFaun and Sergeant-at-Arms Mancina attend such meeting and assist Vice-President Kirby in conducting same.

3. Secretary-Treasurer McFaun be appointed to take true and exact minutes of such meeting.

4. No counsel be permitted to attend this meeting.

5. Only members of the Local in good standing on proper showing of dues books be permitted to participate in the meeting and that all other persons other than those members of Local 2 in good standing and the International Officers specified herein be excluded from participation in the conduct of such meeting."

[5] Defendants were enjoined from:

"1. Assuming control of any membership or Executive Board meetings of Local 2, International Union of Police and Protection Employees—Independent Watchmen's Association;

2. Attending any membership meetings of Local 2, or participating in the deliberation and voting upon the business of such meetings except as provided in the Constitution of the Independent Watchmen's Association and the By-Laws of Local 2, International Union of Police and Protection Employees—Independent Watchmen's Association;

from attending any meetings, or participating in them except as provided in the constitution of I. W. A. and the bylaws of Local 2; from interfering with the attendance of counsel at meetings of Local 2; from interfering with the right of Local 2 members to meet and assemble freely; from preventing the expression of views upon business properly before the meeting; from interfering with the right of officers of Local 2 to preside at meetings of their local union. We agree with Judge Metzner that the rights of the plaintiff, protected by federal law, were threatened by the defendants and we find that the injunction was a proper exercise of his discretion.

Defendants appeal from the preliminary injunction, contending first that no violation of any right secured by Section 101(a)(1) and (2) was shown to justify the order; and second, that the issue was mooted by the holding of the meeting on February 19 without interference, and that there was no showing of the likelihood of future interference.

Section 101(a)(1) guarantees in pertinent part the right of every member of a labor union "to attend membership meetings and to participate in the deliberations . . . of

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3. From interefering with the attendance of counsel for Plaintiffs at meetings at Local 2;

4. From directly or indirectly in violation of the Constitution of the Independent Watchmen's Association, By-Laws and Charter of Local 2 hindering or interfering with the right of plaintiff and all other members of Local 2 to meet and assemble freely with other members;

5. From preventing the expression at meetings of Local 2 views upon any business properly before the meeting;

6. From denying or interfering with the right of duly elected officers and officials of Local 2 to preside over the meetings of the aforesaid Local, all on the ground that such action by the defendants is and will be in violation of 29 U. S. C. 411-413 and 29 U. S. C. 529."

such meetings, subject to reasonable rules and regulations in such organization's constitution and by-laws." And Section 101(a)(2) secures the "right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, . . . upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings." To protect these rights, Section 102, 29 U. S. C. §412, provides that suit may be brought in the federal courts for appropriate relief.

As Local 2 is an affiliate of the I. W. A., its members are bound by the terms of the I. W. A. constitution.[6] Under Article XV, the International Executive Board is given power to discipline any local union or member who, after notice and hearing upon charges, is found guilty of "dishonesty, misconduct, or conduct detrimental to the welfare of the I. W. A., or of violating any provision of this Constitution." Under Article XVII, the International is given authority to establish a trusteeship over any local

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[6] An action may not be brought under Section 102 of the LMRDA to enforce provisions of the union constitution, *Yanity* v. *Benware*, 376 F. 2d 197 (2 Cir. 1967), and no provision of the International constitution can define or limit the rights conferred by Title II of the Act. *Johnson* v. *Nelson*, 325 F. 2d 646 (8 Cir. 1963). It is only when, as here, a claim is made that the constitution is being applied in such a way as to deprive the local members of their secured rights that the documents may be considered. *Gurton* v. *Arons*, 339 F. 2d 371, 374 (2 Cir. 1964). We refer to the constitution only to show that it provides procedures by which abuses in local unions may be controlled by the International, and to indicate that the defendants here chose not to follow those procedures, or even to allege such abuses, but instead sought to assume control of the local under their general supervisory authority. This they cannot do if assumption of control involves a deprivation of a right protected by the Act.

for the purpose of correcting corruption or malpractice, to assure that the local will carry out responsibilities as a bargaining representative, or under a bargaining agreement, to restore democratic procedures, or to otherwise carry out the purposes of the I. W. A. These specified purposes follow exactly the requirements for establishing trusteeships imposed by Title III of the LMRDA, 29 U. S. C. §§461 et seq. Article IX of the I. W. A. constitution gives the International President "other and further powers in addition to those herein enumerated and [he] shall perform such other and further duties as are usual to his office and as are performed by the president in accordance with the practices of the I. W. A." The defendant seeks to justify the supervision outlined in the letter of February 9, 1967 to plaintiffs, not on Article XVII governing trusteeships, nor on Article XV dealing with discipline of local unions and local members, but on the additional and unspecified powers granted to the International President by Article IX of the constitution.[7]

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[7] The asserted control in this case would seem to come within the definition of trusteeship in the Act. Section 3(h) defines trusteeship to mean any "method of supervision or control whereby a labor organization suspends the autonomy otherwise available to a subordinate body under its constitution and bylaws." 29 U. S. C. §402(h). In Title III of the Act, imposition of trusteeship is subjected to regulations specifying the purposes for which it may be imposed and providing a civil action for enforcement of the requirements. See Cox, The Role of Law in Preserving Union Democracy, 72 Harv. L. Rev. 609, 635-44 (1959) outlining the case for federal legislation regulating trusteeships. Professor Cox played a critical role in the process of drafting legislation, and his suggestions were followed closely in the statute as enacted. See Anderson, Landrum-Griffin and the Trusteeship Imbroglio, 71 Yale L. J. 1460, 1498-1500 (1962); Aaron, The Labor-Management Reporting and Disclosure Act of 1959, 73 Harv. L. Rev. 851, 898-902 (1960). We need not decide whether the defendants' action was a lawful trusteeship

The question before us is whether the rights guaranteed by Section 101 of the LMRDA include the right of local members to run the affairs of their union without interference from the international union with which they are affiliated. This question was apparently not considered in the congressional debates leading to passage of the Bill of Rights in the LMRDA.[8] That the legislative history of these provisions of the Act includes no mention of circumstances such as those which give rise to this case does not compel the conclusion that no protection was intended by the Congress. The Bill of Rights that appears as Title I of the Act was hastily drafted and included without much debate. The debate on the guaranty of a right of assembly in Section 101(a)(2) was chiefly concerned with enabling members to confer outside regular meetings for the purpose of discussing union affairs without fear of reprisal

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under its constitution and the Act; nor should we speculate on the reasons behind the plaintiff's decision to bring the suit under Section 102 rather than Section 304. In *Schonfeld* v. *Raftery*, —— F. 2d —— (Aug. 10, 1967), this court upheld an injunction granted under Section 304 to terminate an unlawful trusteeship. In *Flaherty* v. *McDonald*, 183 F. Supp. 300 (S. D. Calif. 1960), it was held that Section 101(a)(1) did not create a right to challenge removal of local officers by an international union acting under the authority of an allegedly improper trusteeship.

[8] The Bill of Rights was originally introduced as an amendment on the Senate floor by Senator McClellan which was revised three days after its passage in an amendment introduced by Senator Kuchel, which was embodied without relevant change in the Landrum-Griffin bill in the House. That bill was adopted in committee and under the prevailing rule could not be amended on the floor. See, e.g., Cox, Internal Affairs of Labor Unions Under the Labor Reform Act of 1959, 58 Mich. L. Rev. 819, 831-42 (1960); Rothman, Legislative History of the "Bill of Rights" for Union Members, 45 Minn. L. Rev. 199 (1960). The legislative history of the Bill of Rights is reproduced at 2 Legislative History of the Labor Management Reporting and Disclosure Act of 1959, 1102-1119, 1220-1239.

by union officials. 105 Cong. Rec. 5812 (daily ed. April 22, 1959) (remarks of Sen. McClellan); see 105 Cong. Rec. 14,336 (daily ed. August 12, 1959) (remarks of Rep. Derwinski). To make this clear, a semi-colon was inserted separating the clause dealing with rights of speech and assembly at such rump sessions from the provisions for freedom of speech at regular meetings, on which we rely here, see 105 Cong. Rec. 6021 (daily ed. April 25, 1959).

Without any express indication of congressional intent, we must determine whether Section 101(a)(2) guarantees a right to meet without interference from the international union by considering the broad purposes of the Bill of Rights. This we have done, and the conclusion that such a right is comprehended by the law seems inescapable. We hold that the guaranty in Section 101(a)(1) of the equal right to participate in the deliberations and voting at union meetings, and the guaranty in Section 101(a)(2) of the right to express views upon business before the meeting necessarily encompass the right to assemble, consult and decide matters of concern to the local union without the inhibiting presence and control by international officials.

The LMRDA was enacted with the clear purpose of assuring "the full and active participation by the rank and file in the affairs of the union." *American Federation of Musicians* v. *Wittstein*, 379 U. S. 171, 182-83 (1964). The Congress by passing a "Bill of Rights" for union members determined that the efficiency of a monolithic union under autocratic rule was gained at too great a price if it necessitated any sacrifice in the members' rights to determine the course of their organization. The balance was struck in favor of union democracy. Only a union

responsive to the rights of all its members can achieve the ideals of responsibility, opportunity and self-determination that are recognized as fundamental values in the labor movement.

To effectuate that determination, the Bill of Rights was incorporated into the Act, guaranteeing each union member protection against infringement of his rights to vote, to meet, and to participate in discussions on matters of concern to him and his union. These rights are protected against incursion or subversion by the individual's own representatives, the officers of his union. Thus, the individual member cannot be disciplined for criticizing or even defaming those officers, *Salzhandler* v. *Caputo*, 316 F. 2d 445 (2 Cir. 1963), and the official of a local union will not be permitted to retaliate against members who attend meetings to consider affiliation with an international union. *Johnson* v. *Local Union No. 58, International Brotherhood of Electrical Workers*, 181 F. Supp. 734 (D. C. Mich. 1960). These rights should be similarly protected against invasion from without the local, for the guarantees carefully enforced against officers of the local would amount to nothing if they could be enjoyed only by the grace of the International.

There can be little doubt that these secured rights of speech and assembly would be compromised if the Local meeting is taken over by the International. The right of assembly must include the right to meet under the supervision of the representatives chosen for that purpose. That is the cornerstone of democratic rule—that the government is freely chosen by the governed. And the representatives, the officers of Local 2, may not be shunted aside without gravely endangering the individual rights of the members.

In attempting to assume control of the meeting of Local 2, the International Union purported to act in order to ensure the rights of local members—but we see in the record before us no indication that any interest of the Local membership was being abused by their chosen representatives. And if the Local officers show insufficient respect to the views of the rank and file, there exist remedies for such infringement within the union organization and by access to the courts. But the defendants have pointedly chosen not to establish a trusteeship according to the procedures set out in Article XVII of the Constitution and Title III of the LMRDA, and in the absence of such recourse, the autonomy of the local union should be our primary concern.

The international union concededly acted to restrain a recalcitrant local from leaving the fold—but the guaranty of self-determination contained in Title I of the Act protects the Local members against such unwanted beneficence. The fundamental requirement of union democracy is that decisions are made according to the expressed desires of those affected; and this requirement is met only where there is full freedom to criticize, to dissent, and to oppose. The best guaranty of this freedom is that the Local meeting be run by the elected officers of the Local; to have hostile outsiders attempt to manage the meeting, determine who may attend, and who is to be recognized is the surest way to stifle and destroy the very rights which the Act seeks to protect.

The principle of union democracy encompasses, as Clyde Summers has said, "the right to choose, even unwisely, [for] self-government is self-fulfillment."[9] We need not

[9] Summers, Democracy in Trade Unions, The New Leader, Feb. 10, 1958, p. 7.

dispute the contention of defendant Gannon that "it is greatly to the advantage of each and every guard to belong to a Union which is as large as possible so that we will have greater bargaining power and greater financial stability." Union autocracy may indeed be more effective in mobilizing the collective power of workers to gain greater material benefits. But Congress determined that the aims of labor organizations were broader, that the ideals of responsibility and self-determination must be weighed with the goal of economic security, and that union democracy was so important to those ideals that it should be protected as a matter of national policy. Professor Cox has said:

> "The law cannot create the spirit of self-government. It cannot compel union members to attend meetings or hold their officers to strict accounting. It cannot compel members to see in labor unions something more than service organizations hired to obtain benefits in return for dues. The most the law can do is to secure the opportunity for workers who wish to take an active part in democratic unions without undue loss of personal freedom." [10]

In electing a new slate of officers in 1965, in asking whether the present insurance company was administering the welfare program successfully, and even in asking whether their particular interests were best served by affiliation with I. W. A., the members of Local 2 were exercising their rights of self-government. Their activity and spirit might be an embarrassment to the I. W. A.;

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[10] Cox, The Role of Law in Preserving Union Democracy, 72 Harv. L. Rev. 609, 644 (1959).

a uniform stance rather than the independence and controversy guiding Local 2 might be preferable to the International. But in Title I, the legislature indicated its preference in union government no less than in political government for the tumult of democracy rather than the order of imposed authority. In particular, Section 101 (a)(2) ensured the right of every member to "express at meetings of the labor organization his views upon . . . any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings." We think it essential to the effectiveness of this guaranty, and implicit therein, that the members be free from inhibiting controls imposed on their meetings from without. The Local has the authority to impose reasonable rules to maintain the order and decorum needed to dispose of the business of the meeting, but that proviso gives no authority for a take-over by the parent organization.

Nor is our conclusion in conflict with other decisions of this court and of the Supreme Court denying relief under Section 102 of the Act. It should be noted that the bounds of guarantees of the Bill of Rights in Title I as determined by the courts are still, some eight years after its enactment, in the early stages of development. In *Calhoon* v. *Harvey*, 379 U. S. 134 (1964), the Supreme Court held that the specific requirements in Title IV, Section 401(2) governing eligibility for office precluded an inference of similar rights in Section 101(a)(1), and that therefore a bylaw requiring that members nominate only themselves for office could not be attacked as a violation of the guarantees of equal voting rights in Section 101(a)(1). Justice Black clearly implied that the voting rights protected by

Section 101(a)(1) must be directly attacked to warrant suit under Section 102. This court was guided by that implication in finding that the right to equality in voting was not violated by the action of the executive board of the union arbitrarily voiding the result of a vote after it is taken. *Gurton* v. *Arons*, 339 F. 2d 371 (1964). But here we rely not on the threat from the International to the voting rights of Local 2 although it would seem that there exists justification for finding that these rights would be attacked, whether directly or indirectly, if the International were permitted to take over the meeting. Here we deal instead with a threatened invasion of the members' right of free discussion, and we find that guaranty encompasses the right to meet under the direction of their own officers untrammelled by outsiders who by their own admission are dissatisfied with the course of action freely taken by the local.

That position is not at odds with the opinion of this court in *Yanity* v. *Benware*, 376 F. 2d 197 (1967). In that case, this court held that the right to meet and assemble freely in Section 101(a)(2) of the Act does not create a right to call meetings of the membership, but rather insures the right to assemble outside regular meetings without fear of reprisal from the union. Thus, it was found that the failure of the union officers to convene a special meeting as they were required to do by their bylaws was not a violation of Section 101(a)(2) and did not justify an action under Section 102. But here we rely not on the meet and assemble clause of the Act, but on the right of discussion at regular meetings which have been called. The majority in *Yanity* explicitly avoided any examination of the scope of this right because the connection between the alleged violation and the injury suffered was too speculative

and remote: "We need not decide the extent to which this provision creates a federal right to bring any appropriate business before a union meeting and have a vote upon it." 346 F. 2d at 200. In this case we decide only that Section 101(a)(2) does create a federal right to discuss matters before a union meeting without the inhibiting presence and supervision of International officers. We need not resolve whether that includes the right to discuss any particular matter, since it seems clear to us that free discussion is impossible if the forum is under the control of superior force, with foreigners patrolling the meeting chamber and exercising the prerogatives of the chair.

The appellant contends that no injunction should issue because there has been no actual interference with the rights of free discussion or assembly. But surely we need not wait until the meeting is held and the members have been suppressed in the exercise of their statutory rights. The potential for suppression of views, indeed the purpose to interfere in the affairs of the local is clear from the defendants' letter, and we know from political experience that once suppressed, the democratic spirit may not soon be revived in Local 2.

Appellant argues, too, that the issue is moot since the letter referred only to the meeting scheduled for February 19, 1967, and that meeting has passed without incident. But the likelihood of interference remains; we have no assurance that the same instinct for control over the activities of Local 2 will not govern the I. W. A. in the immediate future. Injunctive relief is proper when "cessation of illegal conduct did not diminish the risk of future similar conduct." *Lanigan* v. *Local 9, International Brotherhood of Electrical Workers*, 327 F. 2d 627 (7 Cir.), cert. denied,

377 U. S. 979 (1964). See *Walling* v. *Helmerich & Payne*, 323 U. S. 37, 43 (1944); *Local 74, United Brotherhood of Carpenters and Joiners* v. *N. L. R. B.*, 341 U. S. 707 (1951). The district judge acted well within his discretion in granting the injunction.

The order of the district court is, accordingly, affirmed.

Judgment and Order, Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twentieth day of November one thousand nine hundred and sixty-seven.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. J. JOSEPH SMITH,
HON. WILFRED FEINBERG,
Circuit Judges.

ENRIQUE NAVARRO, as President of LOCAL 2 of INTERNATIONAL UNION OF POLICE AND PROTECTION EMPLOYEES—INDEPENDENT WATCHMEN'S ASSOCIATION, and on Behalf of All Members Similarly Situated,
Plaintiff-Appellee,

—v.—

JOHN J. GANNON, Individually and as President of the INDEPENDENT WATCHMEN'S ASSOCIATION,
Defendants-Appellants.

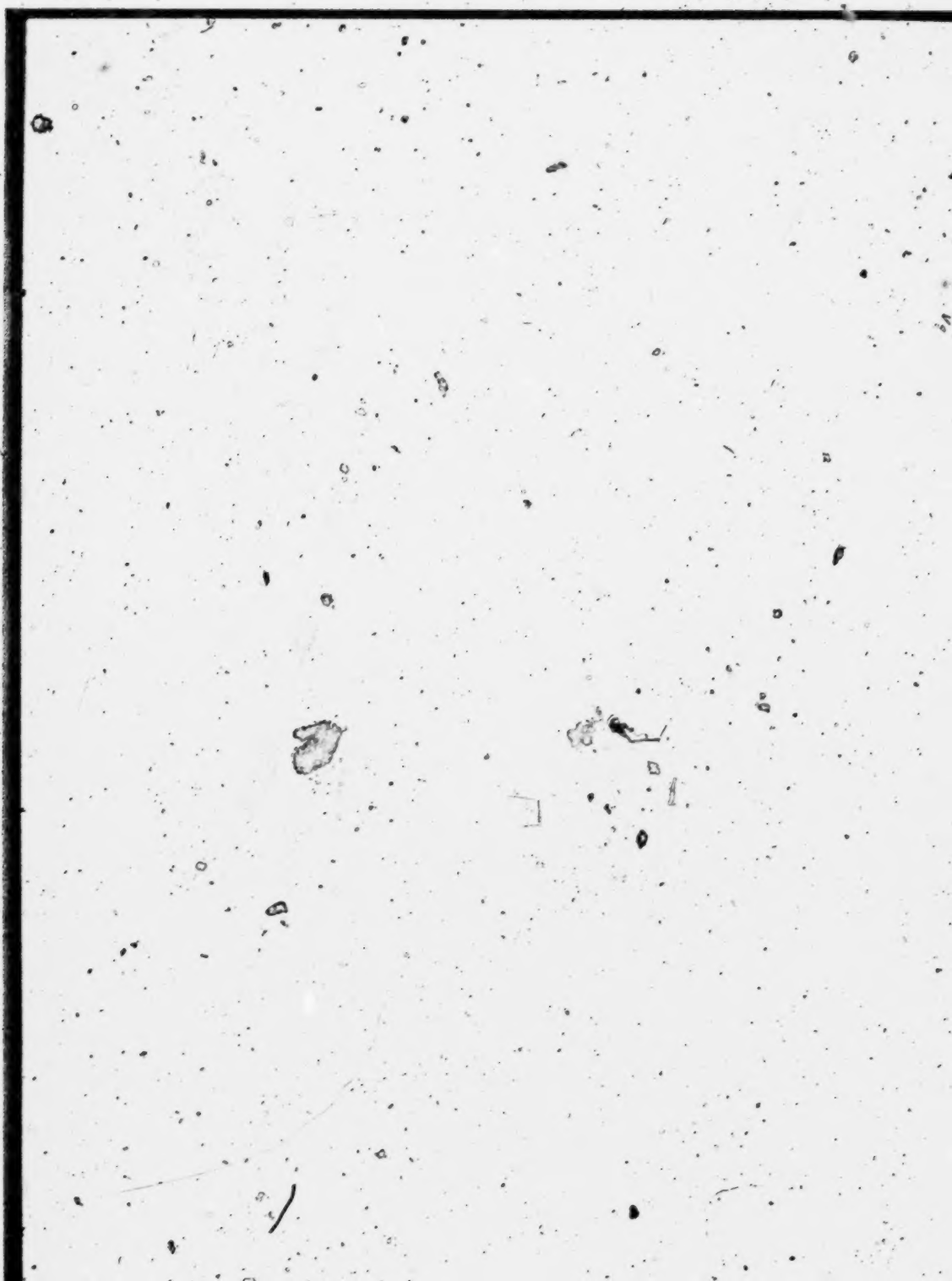
Appeal from the United States District Court for the Southern District of New York.

Judgment and Order, Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk



SUPREME COURT, U. S.

APR 10 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. 1095

JOHN J. GANNON, Individually and as President of INDEPENDENT WATCHMEN'S ASSOCIATION,

Petitioner,

—against—

ENRIQUE NAVARRO, Individually and as President of LOCAL 2 of INTERNATIONAL UNION OF POLICE AND PROTECTION EMPLOYEES-INDEPENDENT WATCHMEN'S ASSOCIATION, and on Behalf of All Members Similarly Situated,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

WILFRED L. DAVIS
Counsel for Petitioner
250 Broadway
New York, N. Y. 10007

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1095

JOHN J. GANNON, Individually and as President of INDEPENDENT WATCHMEN'S ASSOCIATION,

Petitioner,

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Respondent.

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

Pursuant to Rule 58, this Petition for rehearing seeks rehearing of the March 18, 1968 denial of certiorari.

There is an intervening circumstance since filing the original petition which should be of controlling effect.

The adverse opinion of the Court of Appeals for the Second Circuit herein is based only on a letter dated February 9, 1967, from James J. McFaun, Secretary-Treasurer of the Independent Watchmen's Association, written at the direction of petitioner, the president of the I. W. A. to the members of its Local 2.

As appears by reference to the crucial letter itself (Exhibit 1 to Amended Complaint, 13a Appellants' Appendix, Court of Appeals) one of the matters petitioner wished aired at the Local meeting was the proposed change of welfare insurers, to which the International objected, from the Equitable Life Assurance Society to Hamilton Life Insurance Company.

Since the petition was filed herein, reports in the press (*New York Times,* Monday, March 4, 1968 and *The Wall Street Journal,* Monday March 4, 1968) indicate Hamilton Life Insurance Company appears to have become insolvent and proceedings for its liquidation have been instituted by New York State authorities.

For the convenience of the Court, photoprint copies of these two reports are bound in on the opposite page.

(Opposite) ☛

COURT TEST FACED BY HAMILTON LIFE

State Seeks to Take Over Ailing Insurance Company

By ROBERT D. HERSHEY Jr.

The Hamilton Life Insurance Company of New York was directed over the weekend to show cause in the State Supreme Court at Foley Square this morning why the Superintendent of Insurance should not take it over.

The insurance concern, founded in 1959, has been under study by the Insurance Department since a capital impairment was found in a special examination Nov. 22. Papers filed by Superintendent Richard E. Stewart on Friday showed Hamilton to be insolvent.

Policyholders are protected in full under the insurance law, which provides that all policies and annuity contracts written by Hamilton wolud be guaranteed by the Life Insurance Guaranty Corporation, "100 cents on the dollar," Mr. Stewart said.

Hamilton was enjoined Friday from writing any new insurance business. It will be required to show reasons why the injunction should not be made permanent.

Deficit Reported

A special report of Insurance Department examiners indicates that Hamilton's current liabilities exceed its assets by at least $800,000. According to the company's 1967 annual statement, it had a deficit of about $600,000.

A committee was assigned Feb. 7 to make a study of Hamilton operations and to report within 30 days.

"The new information contained in the Hamilton statement and the Insurance Department Examiners' report indicates a substantial deterioration in the financial condition of Hamilton since the date of the Department report presented to the Guaranty Corporation," the Insurance Department said.

It was understood that Albert Barnet became chairman of Hamilton on Thursday, replacing Harold B. Pomeranz. Efforts to reach either man for comment yesterday were unsuccessful.

Hamilton's shares, traded over the counter, closed Friday at 2 bid, 2½ asked. On Nov. 21, the price was 5¼ bid, 6 asked.

Hamilton Life Faces Seizure by New York, Which Calls Firm Insolvent; Officer Quits

By EDWARD P. FOLDESSY
Staff Reporter of THE WALL STREET JOURNAL

NEW YORK—The New York State Insurance Department took court action Friday against troubled Hamilton Life Insurance Co. of New York.

The department obtained an order in a state court directing Hamilton to show cause today why it shouldn't be taken over by the insurance department. The order also temporarily enjoined Hamilton from writing any new insurance, and required the company to show cause why the injunction shouldn't be made permanent.

According to the court papers a special report by the department's examiners, dated this past Friday, showed Hamilton to be insolvent. It indicated that the insurer's current liabilities exceeded assets by "at least $800,000," based on 1967 results with certain adjustments made to March 1.

The department claimed the new information contained in the Hamilton statement and the special study indicated a "substantial deterioration" in the insurer's financial condition and that "immediate action" was necessary.

Chairman Quits

In other developments, it was learned that Harold B. Pomeranz, who was elected chairman of Hamilton last month, resigned Thursday. Albert Barnett, who was chosen as president and chief executive officer last month, was named to temporarily succeed Mr. Pomeranz.

Reached at home yesterday, Mr. Barnett declined comment on Mr. Pomeranz's resignation and refused to discuss the court action.

If the insurance department does receive permission to seize Hamilton it may take steps, at the direction of the court, to rehabilitate the insurer. Should such efforts prove futile, however, the department could apply to the court for Hamilton's liquidation.

The department's special study was conducted by the state Life Insurance Guaranty Corp. The Guaranty Corp. study was commissioned Feb. 7, after a special department examination, dated Nov. 22, showed Hamilton's surplus had fallen below prescribed legal limits.

Under New York law, the Guaranty Corp., which consists of New York legal life insurers, guarantees in full the payment of life insurance policies and other insurance obligations of insurers in the state.

The Guaranty Corp. study, it was indicated, would continue in order to develop further information that "may prove of assistance in the rehabilitation proceedings or in any other proceedings which may follow."

But whatever action is taken, the department stressed "all Hamilton policyholders and beneficiaries are fully protected (by the Guaranty Corp.), 100 cents on the dollar."

Hamilton's own 1967 report wasn't immediately available to the press. The Nov. 22 report of the department was at variance with the company's own figures. The department's examination showed that, as of May 31, Hamilton's liabilities exceeded assets by $674,047.22. At the time, Hamilton's own statement claimed its assets exceeded liabilities by $281,598.42. It was indicated the company has since made adjustments to correct most of the variances. According to the court papers, Hamilton's 1967 report showed liabilities exceeded assets by about $600,000.

An official of Hamilton has estimated that the company has about $415 million insurance in force, made up of $190 million of ordinary and $225 million of group insurance.

This may, at first blush, seem like a narrow factual matter not sufficient to sway the opinoin of this Court as to whether or not this case is of sufficient importance to justify the granting of *certiorari*. Reflection however, indicates that this bald fact is of the utmost importance.

As stated in the original petition herein:

> "The Court of Appeals holding is 'that the LMRDA secures the right of union members to meet without interference from the international union except where the parent organization acts in accordance with lawfully established procedures to institute a trusteeship over the local union.' This holding characterized by the Court of Appeals as 'an important question under the Labor Management Reporting and Disclosure Act', creates a situation where a parent body is prohibited from acting toward its locals except in the most drastic manner. Persuasion and orderly discussion are apparently outlawed if exercised by a parent union. On the other hand the parent is encouraged to take action to prevent almost completely the exercise of almost any local autonomy."

If the International Union chose to impose a trusteeship under its constitution on the ground that placement of union welfare funds with an insurer likely to become insolvent was in prospect, the Court of Appeals holding would not be an obstacle to such trusteeship. When however, the International was reasonably, as recent events have shown, apprehensive of contemplated conduct involving changing the vitally needed welfare insurance funds from a great mutual insurer of international reputation to a company whose solvency was in doubt, and wished to discuss this question in a free and

open meeting, not presided over by the local officials who were possibly pushing such a change for interests of their own, the International's action is branded as a violation of the members' rights.

In a word, the Court of Appeals would permit a Trusteeship and complete loss of local autonomy, but would not permit reasoned discussion, without coercion, of the problems which would justify such trusteeship when such discussion would prevent the necessity of trusteeship.

The LMRDA gives rights to union members—basic rights including rights to express any views, arguments, or opinions [29 U.S.C. 411 (a) (1)]. Should not International officials have the same right to express their opinions in letters openly distributed and subject to refutation in open meeting, presided over by International officers, with no interest in stifling discussion, but only interest in a free expression of the members views?

If the individual member of the union is to have the right of free speech on union affairs should not international officers interested in the Local's welfare, have the same right of free speech?

Dated: April 8, 1968

Respectfully submitted,

WILFRED L. DAVIS
Counsel for Petitioner
250 Broadway
New York, New York 10006

Certificate of Counsel

I hereby certify that this Petition for Rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in paragraph 2 of Rule 58 of the Rules of this Court.

Dated: April 8, 1968.

WILFRED L. DAVIS

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FILED
MAR 4 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1095

JOHN J. GANNON, Individually and as PRESIDENT OF INDEPENDENT WATCHMEN'S ASSOCIATION,

Petitioner,

—against—

ENRIQUE NAVARRO, Individually and as President of LOCAL 2 of INTERNATIONAL UNION OF POLICE AND PROTECTION EMPLOYEES-INDEPENDENT WATCHMEN'S ASSOCIATION, and on behalf of ALL MEMBERS SIMILARLY SITUATED,

Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION

HELLER & PIERCE,
PHILIP PIERCE, *Counsel for Respondent,*
475 Fifth Avenue,
New York, New York 10017.

CHARLES P. AXELROD,
ROBERT M. HELLER,
On the Brief.

TABLE OF CONTENTS

	PAGE
Reported Opinions of the Courts Below	1
Question Presented	2
Statement of the Case	3
(A) The Petition for Review	3
(B) Jurisdiction in the Court of Original Instance	5
(C) The Case as Presented to the Courts Below	6
(D) The Findings of the Courts Below	10
Reasons for Denying the Writ	13
I. The decision below is clearly correct and is not in conflict with decisions of Courts of Appeals of the other Circuits or of this Court; nor is there presented an important question of federal law which has not been, but should be settled by this Court	13
Conclusion	23

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American Federation of Musicians v. Wittstein, 379 U. S. 171 (1964) 18, 19

Calhoon v. Harvey, 379 U. S. 134 (1964) 14, 15, 17, 20

Cleveland Orchestra Committee v. Cleveland Federation of Musicians Local No. 4, American Federation of Musicians, AFL-CIO, 303 F. 2d 229 (6th Cir. 1962) 21

PAGE

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Gurton v. Arons, 339 F. 2d 371 (2nd Cir. 1964) 14, 15, 17, 19, 22

Johnson v. Nelson, 325 F. 2d 646 (8th Cir. 1963) 14

Null v. Carpenters Dist. Council of Houston, 239 F. Supp. 809 (D. C. S. D. Texas 1965) 17

Salzhandler v. Caputo, 316 F. 2d 445 (2nd Cir. 1963); cert. den., 375 U. S. 946 19

Simmons v. Avisco, Local 713, Textile Workers Union, 350 F. 2d 1012 (4th Cir. 1965) 21

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PAGE

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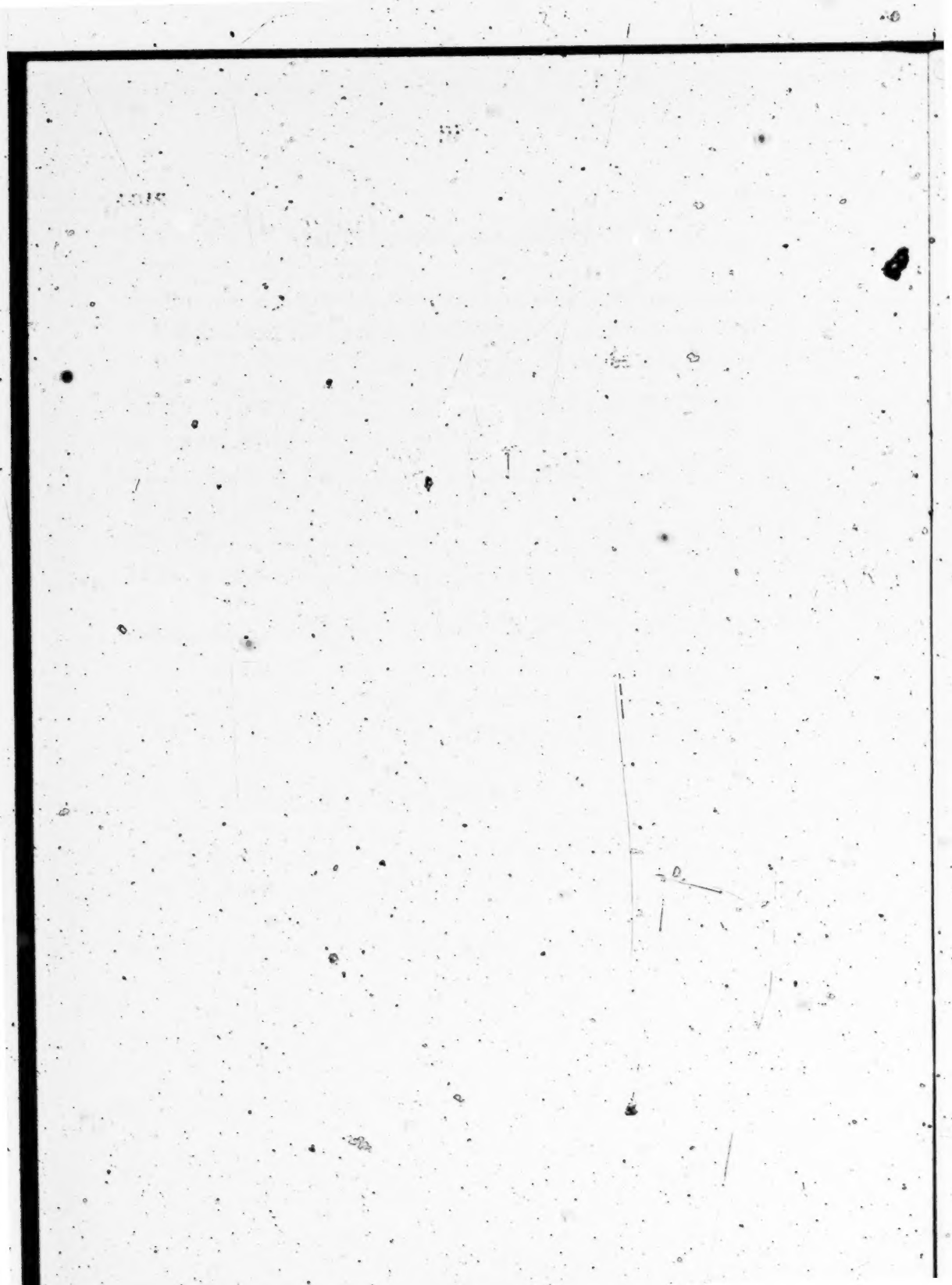
29 U. S. C. 411(A)(2) 5, 8, 10, 11, 14, 15, 18, 19, 20, 21, 22

29 U. S. C. 412 ..... 2, 3, 4, 5

29 U. S. C. 461 11

Federal Rules of Civil Procedure, Rule 65 ..... 2, 3



IN THE

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OCTOBER TERM, 1967

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JOHN J. GANNON, Individually and as PRESIDENT OF INDEPENDENT WATCHMEN'S ASSOCIATION,

Petitioner,

—against—

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Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION

Reported Opinions of the Courts Below

The opinion of the United States Court of Appeals for the Second Circuit, Per Lumbard, Ch. J., is reported at 385 F. 2d 512 (A. 1). The opinion of the United States District Court for the Southern District of New York, Per Metzner, J., is reported at 266 F. Supp. 601 (not appended by petitioner but contained in the record at pp. 111-122).

Question Presented

1. Did the directive of petitioner infringe or threaten to infringe upon the federally protected rights of the individual members of Local 2, as those rights are secured by Sections 101(A)(1) and (2) of the Labor-Management Reporting and Disclosure Act of 1959, as amended, 29 U. S. C. 401 et seq., so as to thereby justify the issuance of a preliminary injunction pursuant to Section 102 of the Act, 29 U. S. C. 412, and Rule 65 of the Federal Rules of Civil Procedure?

A. Where a parent union, without the benefit of authority of a federal statute or of its own constitution (and actually, contra to the express provisions of its own constitution), directs:

> i. that a regular membership meeting of one of its affiliate locals be completely taken over by international officers, which officers have no right to be even present at a local meeting; and further
>
> ii. that the meeting be conducted by said officers to the exclusion of the local officials duly elected by the membership;
>
> iii. and bars the attendance at such meeting by the local's legal counsel,

is there a violation or threatened violation of the rights of the individual members of the local union to meet, assemble and discuss matters before the union meeting as provided for in Sections 101(A)(1) and (2) of the Act, 29 U. S. C. 411(A)(1) and (2)?

B. Does the guaranty of the rights contained in Sections 101(A)(1) and (2) of the Act to meet, assemble and discuss matters properly before a union meeting encompass therein:

i. the right of the individual members of the local to conduct the affairs of their union without undue interference from the international union with which they are affiliated; and

ii. to meet at regular local meetings under the supervision of local officials chosen by the membership for the purpose;

iii. without the presence and control of international officers who have no right to impose their presence at a local meeting?

Statement of the Case*

(A) The Petition for Review

Petitioner seeks a writ of certiorari to review a judgment and order of the United States Court of Appeals for the Second Circuit (A. 18) unanimously affirming an order of the United States District Court for the Southern District of New York, said latter order granting respondent's motion for a preliminary injunction under Rule 65 of the Federal Rules of Civil Procedure and Section 102 of the Labor Management Reporting and Disclosure Act of 1959, 29 U. S. C. 412, and preliminarily enjoining petitioner from interfering with meetings of the respondent's local union (R. 129-132).

* Unless otherwise indicated, all references are to the record on file in this Court.

Specifically, the said order of the District Court enjoined petitioner, during the pendency of the action, from doing the following acts, which he had, as President of Independent Watchmen's Association, undertaken to do:

1) Assuming control of any membership or executive board meetings of Local 2, International Union of Police and Protection Employees-Independent Watchmen's Association;

2) Attending any membership meetings of Local 2, or participating in the deliberation and voting upon the business of such meetings except as provided for in the constitution of the Independent Watchmen's Association and By-Laws of Local 2, International Union of Police and Protection Employees-Independent Watchmen's Association;

3) Interfering with the attendance of Local 2 counsel at meetings of Local 2;

4) Directly or indirectly, in violation of the constitution of the Independent Watchmen's Association, By-Laws and Charter of Local 2, hindering or interfering with the right of respondent and all other members of Local 2 to freely meet and assemble with other members;

5) Preventing the expression at meetings of Local 2, of views upon any business properly before the meeting; and

6) From denying or interfering with the right of any elected officer and officials of Local 2 to preside over the meetings of the aforesaid Local (R. 131).

The preliminary injunction was issued pursuant to 29 U. S. C. 412 (*infra*, fn. 1) upon the ground that certain conduct and activity previously undertaken by the petitioner would, if allowed to continue, deprive the members

of Local 2 of their rights within said labor organization as guaranteed them by 29 U. S. C. 411(A)(1) and (2) (*infra*, fn. 2) (R. 130).

(B) Jurisdiction in the Court of Original Instance

This action, which seeks a permanent injunction and declaratory judgment (R. 73), was instituted in the United States District Court for the Southern District of New York under the express authority contained in Section 102 of the Labor Management Reporting and Disclosure Act of 1959, 29 U. S. C. 412[1] and seeks protection against infringement and threatened infringement of rights secured by Sections 101(A)(1) and (2) of the Act, 29 U. S. C. 411(A)(1) and (2)[2] (R. 115).

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[1] 29 U. S. C. 412:

"Civil Action for Infringement of Rights; Jurisdiction—

Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located."

[2] 29 U. S. C. 411(A)(1):

"(A)(1) Equal Rights—Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and by-laws."

29 U. S. C. 411(A)(2):

"(A)(2) Freedom of Speech and Assembly—Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any

(C) The Case as Presented to the Courts Below

The action was brought by Enrique Navarro, as an individual member, and as President of Local 2, International Union of Police and Protection Employees-Independent Watchmen's Association, and on behalf of all members similarly situated (R. 68). Relief is sought as against John J. Gannon individually and as President of Independent Watchmen's Association (R. 68).

Local 2 is an affiliate local of the Independent Watchmen's Association and as such holds a charter from and operates pursuant to the constitution of the Independent Watchmen's Association and the By-Laws of Local 2 (approved by the Independent Watchmen's Association) (R. 17, 54, 68, 72).

The conduct of the petitioner which necessitated the within action takes the form of a letter (Ex. 1 to amended complaint, R. 76-77) which was self-termed a "directive", and which emanated from petitioner Gannon as International President of Independent Watchmen's Association. Said "directive" issued over the signature of the International Secretary-Treasurer, and was sent to each and every member of Local 2 (R. 18, 56, 114). And by such "directive" petitioner orders that:

---

views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates, in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: Provided, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations."

"1. First Vice-President Kirby attend your next stated meeting called for February 19, 1967 and act as Chairman of such meeting.

2. Secretary-Treasurer McFaun and Sergeant-At-Arms Mancina attend such meeting and assist Vice-President Kirby in conducting same.

3. Secretary-Treasurer McFaun be appointed to take true and exact minutes of such meeting.

4. No counsel be permitted to attend this meeting.

5. Only members of the local in good standing on proper showing of dues books be permitted to participate in the meeting and that all other persons other than those members of Local 2 in good standing and the international officers specified herein be excluded from participation in the conduct of such meeting" (R. 76-77).

This "directive" was preceded by an expression of displeasure over the fact that some of the members of the local allegedly desired to disaffiliate from the international; that the local had replaced its former legal counsel (*who was and still is counsel for petitioner*); and that attempts had been made within the local to change the insurance company responsible for administering the welfare program. In short, a complete "take over" was attempted.

The above is what petitioner characterizes as "only a reasoned discussion without threats of discipline" (Petition, pp. 2-3) meant to "merely stimulate (rather than suppress) discussion" (Petition, p. 8) and as constituting action undertaken by petitioner solely "to furnish information and to provide for an orderly discussion" (Petition, p. 6).

The petitioner's wanton disregard for the rights of the members of Local 2 is underscored when that which petitioner attempted to do under claim of right is viewed against the guarantees contained in Sections 101(A)(1) and (2) of the Act (29 U. S. C. 411(A)(1) and (2)), the petitioner's own Constitution and the By-Laws of Local 2. Parenthetically, it will be noted that the claim of the respondent in the courts below has consistently been that that which petitioner threatened and attempted to do with reference to the meetings of respondent's local union constituted a direct attack upon and threatened infringement of the rights of the individual members of Local 2 as those rights are secured by Sections 101(A)(1) and (A)(2) of the Act; was in direct contravention of the Constitution of the I. W. A. and By-Laws of Local 2; and insofar as the petitioner seeks to justify the action taken on the basis of Article IX of the I. W. A. Constitution (Ex. 2 to amended complaint, p. 9 thereof, R. 78, p. 9) as being an exercise of the inherent supervisory power of the international over the local, is an attempted application of the Constitution and By-Laws in a manner which would deprive the members of Local 2 of statutory rights.

Article IX, Section 1 of the I. W. A. Constitution (Exhibit 2 to amended complaint, R. 78, p. 8) as same refers to the powers and duties of international officers specifically states that the international president shall have the power to attend local meetings. Article V of the By-Laws of Local 2 (Ex. 3 to amended complaint, R. 79, p. 3) which was approved by the I. W. A. specifically states that the local's president shall preside at all local meetings. This is reaffirmed in Article XI of the I. W. A. Constitution (R. 78, p. 13), that absent a contrary By-Law provision, the local's president shall preside at all local meetings.

With reference to the international's secretary-treasurer, Article IX, Section 3 of the I. W. A. Constitution (R. 78, p. 10) vests said officer with the power to record meetings of conventions and international executive board meetings, the recording of *local* meetings being reserved to the local's recording secretary in Article V of the Local 2 By-Laws (R. 79, p. 3). Likewise, Article IX, Section 3 of the I. W. A. Constitution (R. 78, p. 12) only allows the international sergeant-at-arms to assist the international president in maintaining order at meetings over which the international president presides.

It is within the foregoing factual setting that respondent was forced to institute action in the District Court, seeking, inter alia, an injunction restraining petitioner from interfering with the meetings of Local 2 on the ground that such interference would be in violation of the LMRDA, and in particular restraining petitioner from assuming control of the local meeting, from barring attendance of local counsel, from interfering with the right of the members to express views on matters before the meeting, and from interfering with the right of the members to have duly elected local officers preside over their meeting.

The exigencies of the circumstances necessitated the use of an order to show cause (R. 13-15) which was signed by the Hon. Constance Baker Motley at 4:00 P.M. on February 17, 1967.[3] The aforesaid order to show cause contained a temporary restraining order, the terms of which were similar to the preliminary injunction ultimately issued.[4]

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[3] Order to show cause actually signed February 17, 1967, but inadvertently dated February 16, 1967.

[4] The parties appeared before Circuit Judge Anderson on Saturday, February 18, 1967, upon petitioner's application to stay the restraining order of Judge Motley; said application being denied (R. 112).

After a hearing on March 14, 1967, District Judge Metzner, in an order entered on May 3, 1967, granted the motion for a preliminary injunction. Thereafter, and on November 20, 1967, after petitioner had taken an appeal to the United States Court of Appeals for the Second Circuit, a judgment and order was entered in said Court, unanimously affirming the order of the District Court (A. 18).

(D) The Findings of the Courts Below

In the District Court, Judge Metzner found, among other things, that the directive of petitioner and the action therein threatened was on its face violative of 29 U. S. C. 411 (A)(1) and (2), and granted the motion accordingly (R. 120).

Implicit in this finding is the further finding that where a parent union (petitioner), without authority of federal statute or of its own Constitution (and indeed in direct contravention of the express provisions of its own Constitution), directs that a regular meeting of one of its affiliate locals be taken over by international officers, which officers had no right, as such, even to be present at such meeting; and that the meeting be conducted by said officers to the exclusion of the local officials duly elected by the membership; and that legal counsel of the local be excluded, such threatened conduct necessarily constitutes an infringement upon the federally protected rights of the members of the local to meet and assemble freely, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meeting.

The Second Circuit, in an exhaustive opinion (A. 1-17), agreed with Judge Metzner that "the rights of the plaintiff, protected by federal law, were threatened by the defen-

dants" and found "that the injunction was a proper exercise of his discretion" (A. 6).

To set the issues in their proper perspective, the Circuit Court, after reviewing the I. W. A. Constitution and applicable federal law concerning the suspension of local union autonomy (A. 7-8), found that Article XV of the I. W. A. Constitution provided appropriate procedures for disciplining any member or local, and that Article XVII provided for the institution of trusteeships which followed the requirements contained in Title III of the LMRDA, 29 U. S. C. 461 et seq. (A. 7-8). The foregoing was pointed out to show, in the words of the Court "[that] the Constitution * * * provides procedures by which abuses in local unions may be controlled by the international, and to indicate that the defendants here chose not to follow those procedures, or even allege such abuses, but instead sought to assume control of the local under their general supervisory authority. This they cannot do if assumption of control involves a deprivation of a right protected by the Act" (A. 7, fn. 6). In this connection it will be noted that petitioner, as urged below, seeks to justify the threatened supervision solely on the basis of Article IX of the I. W. A. Constitution which is a catch-all provision giving the petitioner unspecified "other and further powers" (Petition, p. 3).

The Circuit Court dealt with the question of the right to meet at regular meetings and participation therein (A. 10) and specifically held that "the guaranty in Section 101(A)(1) of the equal right to participate in the deliberations and voting at union meetings, and the guaranty in Section 101(A)(2) of the right to express views upon business before the meeting necessarily encompass the right

to assemble, consult and decide matters of concern to the local union without the inhibiting presence and control by international officials" (A. 10).

The Court found that the secured rights of speech and assembly would be compromised if the local meeting in these circumstances would be taken over by the international, as the right to assemble must include the right to meet under the supervision of the representatives chosen for that purpose (A. 11). The Court went on to say that "the best guaranty of this freedom [to criticize, dissent and oppose] is that the local meeting be run by the elected officers of the local; to have hostile outsiders attempt to manage the meeting, determine who may attend, and who is to be recognized is the surest way to stifle and destroy the very rights which the Act seeks to protect" (A. 12).

Petitioner presses in this Court that there was no "threatened danger to any right to vote" (Petition, pp. 2 and 6). This argument is at once irrelevant, and incorrect. The Court below held that before it was a threatened invasion of the members' right to free discussion, which encompassed the right to meet under the supervision of the members' own duly elected officers, uninhibited by the overbearing presence of outsiders who were, by their own admission dissatisfied with the members' previous course of free discussion (A. 15). In this connection it was found that free discussion would be impossible if the forum were to be under control of a superior force, with "foreigners" patrolling the meeting chamber and exercising the prerogatives of the chair (A. 16).

Reasons for Denying the Writ

I.

The decision below is clearly correct and is not in conflict with decisions of Courts of Appeals of the other Circuits or of this Court; nor is there presented an important question of federal law which has not been, but should be settled by this Court.

Petitioner urges that the opinion of the Court of Appeals creates a situation where "persuasion and orderly discussion are apparently outlawed if exercised by a parent union" (Petition, p. 4). This contention must be examined against the entire background of this case and in particular in the light of what petitioner attempted to do. At issue here are basic and essential federally guaranteed rights of union members. "Persuasion" and "orderly discussion" by a parent union are not outlawed *so long as the parent acts in a manner which does not deprive the members of an affiliate local of their statutory rights.* In the case at bar, petitioner had undertaken a course of "persuasion" and "orderly discussion" by seeking to assume complete control over a local meeting, thus to create a captive audience to listen to what petitioner had to say. Petitioner would seek to "persuade" the members of the local by suspending their system of self-government and by a brazen show of authority force the members in lawful attendance to meet with outsiders, not even members of the local, who had no right to set foot in the meeting chamber save by invitation. Petitioner urges that the directive was meant to "merely stimulate (rather than suppress) discussion" (Petition, p. 8). One is hard put to see how such directive

could result in anything short of the *stifling* of free discussion by the membership. As the Court of Appeals aptly put it "it seems clear to us that free discussion is impossible if the forum is under the control of superior force, with foreigners patrolling the meeting chamber and exercising the prerogatives of the chair" (A. 16). It seems quite clear that "persuasion and orderly discussion" as visualized by petitioner, are synonymous with intimidation and disregard for the rights of the members of Local 2.

Accordingly the members of Local 2 sought protection against infringement and threatened infringement of their rights as guaranteed them in Sections 101(A)(1) and (2) of the Act, 29 U. S. C. 411(A)(1) and (2). If, in the circumstances of this case, protection of those federal rights will have the ancillary effect of preventing petitioner from embarking upon his peculiar style of "persuasion and orderly discussion", then that must unavoidably be. No policy determination or directive from any international office or any provision contained in an international constitution can define, limit or otherwise infringe upon the rights which respondent seeks to have protected. *Johnson* v. *Nelson*, 325 F. 2d 646, 653 (8th Cir. 1963).

When as here, it is found that statutory rights of a union member are being violated or are threatened with violation (even by a parent union), a duty is cast upon our federal courts to insure that the federal rights of that union member are preserved and protected. Indeed, the Court in *Calhoon* v. *Harvey*, 379 U. S. 134 (1964), recognized this principle in holding that a direct attack on statutory rights would justify court interference.

Petitioner places great emphasis upon *Gurton* v. *Arons*, 339 F. 2d 371 (2nd Cir. 1964), in arguing that only in the

most extreme cases where rights under the LMRDA are under direct attack will Court interference be justified. The fact remains that *Gurton* and *Calhoon* stand for the proposition that so long as there is an attack upon these federal rights our federal courts may act. In *Gurton* the Court stated at p. 375 that "so long as the union • • • violates no provision of law, we judges should resolutely keep hands off". Implicit in this statement is the holding that where there is a violation of the LMRDA there is a duty upon the court to intervene. Chief Judge Lumbard, who wrote the opinion for the Court below recognized the role of the federal courts in cases of this sort when, in writing a concurring opinion in *Gurton*, he stated at pp. 375-376, that the role of the Court was to insure that "choice is made in a manner which does not violate the rights of members under Section 101(A)(1)". As will be seen herein, rights provided for and secured by 29 U. S. C. 411(A)(1) and (2) came under direct attack by petitioner when he issued his directive, and the resulting injunction was properly issued and properly upheld.

As previously noted, the conduct of the petitioner which has resulted in the case at bar takes the form of a letter (Ex. 1 to amended complaint, R. 76-77) which was self-termed a "directive" and which emanated from petitioner Gannon as International President of the Independent Watchmen's Association over the signature of the International Secretary-Treasurer. This directive was sent to each and every member of Local 2 (R. 18, 56, 114) and stated that petitioner *directed* that the international officers assume control over the conduct of a previously scheduled local meeting (R. 77). Also directed was the exclusion of the duly appointed legal counsel of Local 2, and all

persons other than paid up members and international officers. This action was attempted under the guise of the inherent supervisory power of the international over the local, and as being purportedly authorized by Article IX of the I. W. A. Constitution which grants to the International President additional but unspecified powers (R. 57, Petition, pp. 3-4).

Article IX, Section 1 of the I. W. A. Constitution (R. 78, p. 8) as same refers to the powers and duties of international officers specifically states that the International President shall have power to *attend* local meetings. Nowhere in Article IX is the power given to any international officer to attend meetings *other than the International President.* Indeed, the power of the International President to attend meetings means only that he is authorized to be physically present—no authority is conferred upon him or to any other person in the I. W. A. to preside over a meeting of Local 2. In this connection it will be noted that Article XI of the I. W. A. Constitution (R. 78, p. 13) specifically states that in the absence of a contrary By-Law provision the local's President shall preside over local meetings, and Article V of the By-Laws expressly provides that the local's President shall preside at *all* local meetings (R. 79, p. 3). With reference to the International Secretary-Treasurer, Article IX, Section 3 of the I. W. A. Constitution (R. 78, p. 10) vests said officer with the power to record meetings of conventions and International Executive Board meetings, the recording of local meetings being specifically reserved to the local recording secretary per Article V of the By-Laws (R. 79, p. 3). Likewise, Article X, Section 4 of the I. W. A. Constitution (R. 78, p. 12) only allows the International Sergeant-At-Arms to assist the

International President in maintaining order, presumably at meetings over which the International President presides.

The Constitution of the I. W. A. and By-Laws of Local 2 were properly before the Court below for review in determining whether or not the preliminary injunction was correctly issued. This is particularly so in view of the contention of petitioner that what was sought to be done was consistent with Article IX of the I. W. A. Constitution (R. 78, p. 9) as being an exercise of the inherent supervisory power of the International over Local 2 (R. 57, Petition, pp. 3-4).

Where the claim is that the Constitution and By-Laws are being applied so as to deprive persons of rights under 29 U. S. C. 411, the aforesaid documents may be considered. *Gurton* v. *Arons*, 339 F. 2d 371 (2nd Cir. 1964); *United Brotherhood of Carpenters and Joiners of America* v. *Brown*, 343 F. 2d 872 (10th Cir. 1965); *Null* v. *Carpenters Dist. Council of Houston*, 239 F. Supp. 809 (D. C. S. D. Texas 1965). Indeed, this Court in *Calhoon* v. *Harvey*, 379 U. S. 134 (1964) examined the Constitution and By-Laws of the union in that case in determining whether or not a violation under the LMRDA had occurred.

In *Gurton* the Court said at p. 374, that "as long as no claim is made that provisions of the Constitution and By-Laws are being applied in such a way as to deny equality in voting, there is nothing in Section 101 which authorized consideration of those documents." The case at bar is the converse of *Gurton* in that here such a claim was made, to wit: that when petitioner sought to justify his "directive" upon Article IX of the I. W. A. Constitution, there was an attempted application of the Constitution and By-Laws

in a manner which would deprive the members of Local 2 of their rights to meet, assemble, etc. as provided for in Title I of the Act. The Court of Appeals took pains to point out that "we refer to the Constitution only to show that it provides procedures by which abuses in local unions may be controlled by the international, and to indicate that the defendants here chose not to follow those procedures, or even to allege such abuses, but instead sought to assume control of the local under their general supervisory authority. *This they cannot do if assumption of control involves a deprivation of a right protected by the Act*" (A. 7, fn. 6, A. 8). (Emphasis supplied.)

Petitioner argues that no rights of respondent as provided by Title I of the Act were violated or were threatened with violation by his directive (Petition, p. 6). Section 101(A)(1), 29 U. S. C. 411(A)(1) guarantees in pertinent part the right of every member of a labor union "to attend membership meetings and to participate in the deliberations of such meetings, subject to reasonable rules and regulations in such organization's Constitution and By-Laws." Section 101(A)(2), 29 U. S. C. 411(A)(2) secures the "right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views * * * upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings."

The foregoing "Bill of Rights" provisions were included in the Act to protect and foster participation by the rank and file in the affairs of the union. *American Federation of Musicians* v. *Wittstein*, 379 U. S. 171, 182-183 (1964). The foregoing was described by this Court at p. 182 as "the

pervading premise" of the Act. The rights provided in and secured by the Act have been interpreted to insure free and untrammeled discussion and to strengthen internal union democracy. *Salzhandler* v. *Caputo*, 316 F. 2d 445 (2nd Cir. 1963), cert. den., 375 U. S. 946 (1963); *United Brotherhood of Carpenters and Joiners of America* v. *Brown*, 343 F. 2d 872 (10th Cir. 1965); *Green* v. *Local 705, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO*, 220 F. Supp. 505 (D. C. E. D. Michigan 1963); *Grand Lodge* v. *King*, 335 F. 2d 340 (9th Cir. 1964), cert. den. 379 U. S. 920. The individual members of a labor organization are given protection with a view toward allowing those members to conduct local affairs with a minimum of outside interference, and the internal operations of unions are left to the officials chosen by the members to manage those operations except in the very limited instances expressly provided by the Act. *United Brotherhood of Carpenters and Joiners of America* v. *Brown, supra; Gurton* v. *Arons*, 399 F. 2d 371 (2nd Cir. 1964). It is respectfully submitted that the Court below properly found that the petitioner, in attempting to take over the local meeting, posed a direct and immediate threat to the rights contained in the foregoing statutes.

The decision below is in complete conformity with the foregoing authorities and within the spirit, intent and purpose of the LMRDA. Certainly, there is no conflict between the various Circuits as to how the Rights provided for by Sections 101(A)(1) and (2) of the Act are to be interpreted, that question having been settled with finality when this Court held in *American Federation of Musicians* v. *Wittstein*, 379 U. S. 171, 182-183 (1964), that these rights are to protect and foster participation by the rank

and file in the affairs of the union. In this connection it will be noted that the Second Circuit in no way conflicted with its own opinion in *Yanity* v. *Benware*, 376 F. 2d 197 (2nd Cir. 1967). In *Yanity* the Court held that the right to meet and assemble is applicable to *participation* in meetings and not to the general right to hold meetings. *Participation* by members in their regular meetings is the heart of the case at bar and is what the lower Court concerned itself with (A. 15). Nor is there any question as to when our federal courts should intervene to protect these rights. That too has been passed upon by this Court in *Calhoon* v. *Harvey*, 379 U. S. 134 (1964). The decision below is sound and rests upon propositions of law which have emerged from this Court and from the various Circuit Courts within the brief period of time that the "Bill of Rights" has been a part of the body of federal labor law.

There is no important question of federal law presented by petitioner which has not been, but should be settled by this Court. True, the bulk of those cases decided under Sections 101(A)(1) and (2) of the Act have in the main dealt with voting rights, and our federal courts for the most part have not been presented with violations of the exact kind presented here. That fact alone does not create in this case a question of federal law which ought to be separately settled. The facts of this case are quite clear and not open to dispute. The only question in this case was as to the effect of petitioner's directive upon the rights of the members of Local 2, and on this question there again can there be no dispute.

The Court of Appeals properly found that the right of speech and assembly encompasses the right to meet under the supervision of the representatives chosen by the mem-

bers of the local for that purpose and that the aforementioned secured rights would be compromised if the local meeting is taken over by the International (A. 11).

By arbitrarily and without authority, "directing" the individual members of Local 2 that *they* would have *their meeting* run in a manner other than as provided in *their* own Constitution and By-Laws, without the benefit of *counsel of their own choosing,* the petitioner manifested a wanton disregard for the rights of the individual members. Indeed, if Section 101(A)(1) gives a right to attend membership meetings, such right must necessarily mean meetings which are to be held in accordance with the will of the membership as evidenced by their Constitution and By-Laws.

Each and every member of Local 2, by virtue of assuming membership in the union, has contracted that he would be governed by the Constitution and By-Laws of the union. *Cleveland Orchestra Committee* v. *Cleveland Federation of Musicians Local No. 4, American Federation of Musicians, AFL-CIO,* 303 F. 2d 229 (6th Cir. 1962). In like manner, the International is bound by its own Constitution. *Simmons* v. *Avisco, Local 713, Textile Workers Union,* 350 F. 2d 1012 (4th Cir. 1965); *United Nuclear Corp.* v. *NLRB,* 340 F. 2d 133 (1st Cir. 1965).

Can the rights contained in Sections 101(A)(1) and (2) to meet, assemble, and participate have meaning or substance if they do not include therein the right to meet with the benefit of legal advice, under the supervision of the representatives lawfully chosen for that purpose? In its holding, the Court of Appeals stated that "that is the cornerstone of Democratic rule—that the government is freely chosen by the governed. And the representatives,

the officers of Local 2, may not be shunted aside without gravely endangering the individual rights of the members" (A. 11). This is completely consistent with *United Brotherhood of Carpenters and Joiners of America* v. *Brown*, 343 F. 2d 872 (10th Cir. 1965); and *Gurton* v. *Arons*, 339 F. 2d 371 (2nd Cir. 1964) wherein it was held that protection is afforded under the LMRDA with a view toward allowing the members to conduct local matters with a minimum of outside interference, leaving the internal operations of the Union to the officials chosen by the members to manage those operations, except where otherwise expressly provided by the Act. Here petitioner sought clearly to disrupt a local meeting and to usurp the membership's prerogative of self-management by the officers chosen for that purpose.

Section 101(A)(1) guarantees the right to attend membership meetings, and to participate in the deliberations therein. Section 101(A)(2) secures the right to meet with other members, and protects free expression of views at such meetings. On its face the directive presented a plain threat to those rights. It was demonstrated to the Court below that under the Constitution and By-Laws involved (*supra*), only the International President was given the right to *attend* a local meeting. No right is given to any other international officer to attend a local meeting, much less preside thereat. By petitioner's directive he attempted to forceably place outsiders (not local union members), in the meeting chamber of the members of Local 2, and forced the members to meet with these persons. It is quite clear that freedom of assembly and of association were thus glaringly attacked.

Further, the right to free expression of views was surely jeopardized. The atmosphere which petitioner sought to create at the local meeting was one of absolute control and domination by the international. The lower Court, in discussing this freedom was of the opinion that "free discussion is impossible if the forum is under the control of superior force, with foreigners patrolling the meeting chamber and exercising the prerogatives of the Chair" (A. 16). Said conclusion is inescapable. A contrary holding would have stripped the statutory guarantees here at issue of all substance.

CONCLUSION

For the reasons set forth above it is respectfully submitted that the petition for a wr't of certiorari be denied.

Respectfully submitted,

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CHARLES P. AXELROD,
ROBERT M. HELLER,
On the Brief.

3-19

THE SUPREME COURT OF OHIO

STATE OF OHIO,
Plaintiff-Appellee,

v.

ROBERT LEROY PRUETT,
Defendant-Appellant.

CASE NO. 41163

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STATE OF OHIO)
) SS.
ASHTABULA COUNTY)

IN THE SUPREME COURT OF OHIO

CASE NO. 41163

THE STATE OF OHIO

PLAINTIFF-APPELLEE

-vs-

ROBERT LEROY PRUETT

DEFENDANT-APPELLANT

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

1. Notice is hereby given that Robert LeRoy Pruett, the appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of the State of Ohio overruling the defendant's motion for leave to appeal, entered on the 20th day of December, 1967, which appeal was from a final order of the Court of Appeals of Ashtabula County, Ohio, Seventh Appellate District entered on the 23rd day of June, 1967, which affirmed the jury verdict of the Common Pleas Court of Ashtabula County, Ohio, finding the defendant guilty of murder in the first degree and sentencing him to death by electrocution.

This appeal is taken pursuant to 28 U.S.C.A Section 1257 (3).

Appellant was convicted of the crime of murder in the first degree in violation of Ohio Revised Code Section 2901.01; was sentenced to death by electrocution and is presently confined at the Ohio State Penitentiary in Columbus, Ohio.

2. Several questions involving the Constitution of the State of Ohio and the Constitution of the United States will be presented by this appeal.

FILED
FEB 7 1968
SUPREME COURT OF OHIO
THOMAS L. STARTZMAN, Clerk

NAZOR AND NAZOR

BY Gordon L. Nazor

BY Howard M. Nazor

ATTORNEYS FOR DEFENDANT-APPELLANT
Gillmore Building
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STATE OF OHIO)
) SS.
ASHTABULA COUNTY)

IN THE SUPREME COURT OF OHIO

CASE NO. 41163

THE STATE OF OHIO
PLAINTIFF-APPELLEE

-vs-

ROBERT LEROY PRUETT
DEFENDANT-APPELLANT

PRECIPE

TO THE CLERK:

Please prepare a certified transcript of the entire Record in this case and forward the same to the Clerk of Court of the Supreme Court of the United States for the reason that the defendant is in the process of preparing and will shortly file in said Court a Petition for a Writ of Certiorari.

NAZOR AND NAZOR

BY Gordon R. Nazor

BY Howard M. Nazor

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FILED
FEB 7 1968
SUPREME COURT OF OHIO
THOMAS L. STARTZMAN, Clerk

THE SUPREME COURT OF OHIO, JANUARY TERM, 1967

CASE NO. 41163

ATTORNEYS	TITLE OF CASE	ACTION
Joseph E. Mahoney Prosecuting Attorney Jefferson, Ohio	State of Ohio, Plaintiff-Appellee, v. Robert LeRoy Pruett, Defendant-Appellant.	Appeal from the Court of Appeals of Ashabula County Motion for Leave to Appeal from the Court of Appeals of Ashtabula County
Nazor & Nazor Howard M. Nazor Gordon L. Nazor Gillmore Building Main Avenue Ashtabula, Ohio		

DATE	MEMORANDA OF PLEADINGS, ETC., FILED, WRITS ISSUED ETC., JUDGMENTS, ORDERS AND DECREES
July 25, 1967	Notice of Appeal and Certificate of Service filed.
July 25, 1967	Extension of Appellant's Memorandum to August 25, 1967. Kingsley Taft, Chief Justice J. 48-302
July 26, 1967	Execution of sentence stayed pending appeal in this Court. Kingsley Taft, Chief Justice. J. 48-303
August 3, 1967	Acknowledgment of Stay by Warden filed.
August 24, 1967	Extension of Memorandum of Appellant to September 25, 1967. Kingsley Taft, Chief Justi J. 48-325
July 25, 1967	Motion to stay execution of death sentence and Certificate of Service filed.

September 25, 1967	Memorandum of Appellant and Certificate of Service filed.
October 17, 1967	Extension of Memorandum Opposing Jurisdiction to November 11, 1967. Kingsley Taft, Chief Justice. J. 48-389
November 29, 1967	Memorandum of Appellee filed.
November 29, 1967	Hearing by Master Commissioners.
December 20, 1967	Motion for Leave to Appeal overruled. J. 48-469
December 20, 1967	Dismissed, Sua Sponte, No Substantial Constitutional question involved. Execution Date February 9, 1968. J. 48-475
January 4, 1968	Motion for stay of execution pending appeal in the United States Supreme Court filed.
January 4, 1968	Stay execution of sentence pending timely appeal to determination by United States Supreme Court. Kingsley Taft, Chief Justice J. 48-489
January 8, 1968	Acknowledgment of stay from Warden filed.
February 7, 1968	Notice of Appeal and Precipe to United States Supreme Court filed.

JOURNAL ENTRIES

JOURNAL 48, Page 302
ENTRY

On written request of counsel for appellant and for good cause shown it is ordered that the time for filing memorandum in support of jurisdiction is extended to August 25, 1967.
/s/ Kingsley Taft, Chief Justice

JOURNAL 48, PAGE 303
ENTRY

This cause pending before this Court on a motion for leave to appeal and an appeal as of right from the Court of Appeals for Ashtabula County, and upon consideration of the motion filed by counsel for Appellant to stay execution of sentence it is therefore

ORDERED that execution of sentence be, and the same hereby is, stayed pending final determination of such appeal by this Court.

It is further ORDERED that the Clerk of this Court shall forthwith send a certified copy of this stay of execution to the Warden of the Ohio Penitentiary, who shall acknowledge receipt thereof.
/s/ Kingsley Taft, Chief Justice

JOURNAL 48, PAGE 325
ENTRY

On written request of counsel for appellant and for good cause shown, it is ordered that the time for finling memorandum in support of jurisdiction is extended to September 25, 1967.
/s/ Kingsley Taft, Chief Justice

JOURNAL 48, PAGE 389
ENTRY

On written request of counsel for appellee and for good cause shown, it is ordered that the time for filing memorandum opposing jurisdiction is extended to November 15, 1967.
/s/ Kingsley Taft, Chief Justice

JOURNAL 48, PAGE 469
MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS FOR ASHTABULA COUNTY

It is ordered by the Court that this motion is overruled.

JOURNAL 48, PAGE 475
APPEAL FROM THE COURT OF APPEALS FOR ASHTABULA COUNTY

This cause, here on appeal as of right from the Court of Appeals for for Cuyahoga County, was heard in the manner prescribed by law, and no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein and it appearing to the Court that the date heretofore fixed for the execution of the judgment and sentence of the Court of Common Pleas is now past, this proceeding as required by law does hereby fix the 9th day of February, 1968, as the date for carrying said sentence into execution by the Warden of the Ohio Penitentiary, or in his absence by the Deputy Warden, in accordance with the statutes in such case made and provided.

It is further ordered that a certified copy of this entry and a warrant under the seal of this Court be duly certified to the Warden of the Ohio Penitentiary and the Warden make due return thereof to the Clerk of the Court of Common Pleas of Ashtabula County.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Ashtabula County for entry.

JOURNAL , 48 PAGE 489
ENTRY

Upon consideration of the motion, filed by counsel for Appellant, to stay the execution of sentence pending the timely filing of an appeal to the Supreme Court of the United States, it is therefore

ORDERED that the execution of sentence be, and hereby is, stayed pending the timely filing of an appeal to the Supreme Court of the United States, and it is further ordered that if such appeal is timely filed, this stay will continue for an indefinite period pending final determination by the Supreme Court of the United States.

It is further ORDERED that the Clerk of this Court shall forthwith send a certified copy of this entry staying execution to the Warden of the Ohio Penitentiary, who shall adknowledge receipt thereof.
/s/ Kingsley Taft, Chief Justice

41163

CASE NO. 598

IN THE COURT OF APPEALS

Seventh District
State of Ohio, Ashtabula County, SS.

THE STATE OF OHIO
Plaintiff-Appellee

vs.

ROBERT LeROY PRUETT
Defendant-Appellant

Filed 7-25-67 Sup. Ct. of Ohio

NOTICE OF APPEAL

(Filed in Court of Appeals--July 20, 1967)
(Filed in Supreme Court--July 25, 1967)

Now comes the appellant and hereby gives notice of his appeal to the Supreme Court of Ohio from a final order of the Court of Appeals of Ashtabula County, of the Seventh Appellate District, entered on the 23rd day of June, 1967, which was as follows:

> "At a Term of the Court of Appeals, Seventh Appellate District, within and for the County of Ashtabula, and State of Ohio, begun and held in the Common Pleas Courtroom at Jefferson, Ohio, on the 23rd day of March, 1966, before the Hon. Nils P. Johnson, the Hon. George M. Jones and the Hon. John J. Lynch, Judges, among other proceedings then and there had by and before said Court, as appears by its Docket, is the following to-wit:
>
> State of Ohio, Plaintiff-Appellee, vs. Robert LeRoy Pruett, Defendant-Appellant, May 19, 1965, No. 598. This cause came on to be heard upon the bill of exceptions, the original papers and pleadings in the Court of Common Pleas of Ashtabula County, Ohio, and was argued by counsel.
>
> On consideration whereof, of all the assignments of error the Court finds that there is no error prejudicial to the defendant-appellant apparent on the record, in said proceedings and judgment, and that, in its opinion, substantial justice has been done to the Party complaining, as shown by the record of the proceedings, and the judgment under review.

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IT IS, THEREFORE, CONSIDERED BY THE COURT, that the judgment aforesaid be, and the same hereby is affirmed, and that the plaintiff-appellee recover from the defendant-appellant its costs herein expended, taxed at $_____.

That a Special Mandate be sent to the Court of Common Pleas of Ashtabula County, to carry this judgment and costs into execution, and it being made to appear to this Court that the day on which the said Robert LeRoy Pruett was, by said Court of Common Pleas duly sentenced to be electrocuted, to-wit: the 18th day of August, 1965, is now past, and pending proceedings of this Court, stay of execution was granted to said Robert LeRoy Pruett, until finally disposed of by this Court, and until further order.

This Court proceeding as required by O.R.C., Sec., 2953.07 to appoint a day for the carrying of said sentence into execution, it is ordered and adjudged that said sentence of death by electrocution, pronounced and passed upon said Robert LeRoy Pruett, by said Court of Common Pleas of Ashtabula County, Ohio, be carried into execution by the Warden of the Ohio Penitentiary on the 1st day of August, 1967, in accordance with the provisions of the Statute in such case made and provided, and that said Warden forthwith make due return thereof to the Clerk of the Court of Common Pleas of Ashtabula County, Ohio.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that a copy of this entry be certified to the Clerk of the Court of Common Pleas of Ashtabula County, for entry, and the defendant-appellant, Robert LeRoy Pruett, being now by order of this Court in the custody of the Warden of the Ohio Penitentiary, it is further ordered that a copy of this Entry and Warrant be dully certified to said Warden.

To all of which holdings, orders and judgment, the defendant-appellant, Robert LeRoy Pruett, excepts."

This case did not originate in the Court of Appeals, is on questions of law, and does involve substantial constitutional questions.

NAZOR AND NAZOR
Attorneys for Defendant-Appellant

Service of copy of the foregoing Notice of Appeal is acknowledged this 20th day of July, 1967.

JOSEPH E. MAHONEY
Prosecuting Attorney

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TABLE OF CONTENTS:

Notice of Appeal ---------- 1

Statement of Facts ---------- 3

Questions of Law Presented ---------- 9

Reasons Why Case Contains Issues of Law of Public or Great General Interest and Substantial Constitutional Questions ---------- 11

(1) A seizure and search of a defendant's motor vehicle without a search warrant and not made contemporaneously with the time and at the same place of the arrest is in violation of the 4th Amendment to the U. S. Constitution, and any alleged evidence obtained as a result thereof should be suppressed and the admission of said evidence at the trial of the cause constitutes reversible error ---------- 11

(2) Where the investigation in a criminal case is no longer a general inquiry into an unsolved crime, but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations which lends itself to eliciting incriminating statements, not having effectively warned the suspect of his absolute constitutional right to remain silent, no statement elicited by the police during said interrogation may be used against him at a criminal trial, as said interrogation and said resulting statement being admitted into evidence constitutes a violation of the 6th Amendment to the Federal Constitution and thereby said admission of said evidence constitutes reversible error. See Escobedo v. Illinois, 32 O. O. (2d) 31. Also 378 U. S. 478 (1964) ---------- 18

(3) Where a juror, prior to being sworn as a juror and permitted to sit in the case, makes the statement to other prospective jurors that he is of the opinion that the defendant is guilty, the defendant is deprived of a fair and impartial trial under the 6th Amendment to the Federal Constitution ---------- 21

(4) Where an indictment alleges murder in the first degree while in the commission of rape, it is error for the trial Court to permit the indictment to be amended to include a second and separate offense of murder in the first degree while attempting to commit rape. The indictment, however, having been so amended, it is error for the trial Court to submit such indictment to the jury, and it is further error for the jury to return a verdict of guilty generally to the indictment which included two offenses, the two offenses being inconsistent, one with the other ---------- 25

LAW OFFICES OF NAZOR & NAZOR

(5) It is error for the Court to permit rebuttal evidence by the State when in fact said evidence rebuts no part of the evidence of the defense. This evidence having been admitted in rebuttal, it is further error for the Court to refuse the defendant the right to surrebuttal, that is to say, to present evidence refuting the evidence introduced in the State's rebuttal---------- 29

APPENDIX:

Portion of the Record Containing the Oral Ruling of the Common Pleas Court Sustaining the Defendant's Motion to Suppress the Evidence, Which Ruling the Court Subsequently Overruled---------- 37

Journal Entry of the Common Pleas Court Overruling the Motion to Suppress---------- 38

Journal Entry of Common Pleas Court Overruling State's Motion to Amend the Indictment---------- 39

That Portion of Journal Entry Sustaining Motion of State to Amend Indictment---------- 40

Verdict-Guilty, in Common Pleas Court---------- 40

Sentence on Verdict of Murder in First Degree---------- 41

Journal Entry of Common Pleas Court Overruling Motion for New Trial---------- 42

Journal Entry of Court of Appeals---------- 42

Opinion of Court of Appeals---------- 45

Amendments to the United States Constitution---------- 46

Statutes---------- 47

LAW OFFICES OF NAZOR & NAZOR

TABLE OF AUTHORITIES

CASES.

Abel v. U. S., 4 L. Ed. (2d) 668---------- 16
Agnello v. U. S., 70 L. Ed. 145---------- 13,14
Alexander v. Green, 2 O. S. (2d) 231---------- 19
Carr v. State, 22 O. App. 78---------- 24
Dennis v. U. S., 70 S. Ct. 518, 339 U. S. 162----------21
Donald v. State, 11 O.C.D. 483---------- 33
Escobedo v. Illinois, 378 U. S. 478 ----------9, 18, 20
Fahy v. Connecticut, 375 U. S. 85----------11
Harris v. State, 125 O. S. 257---------- 27
Itskin v. State, 51 App. 211---------- 33
Ker v. California, 374 U. S. 23----------13
Mallory v. U. S., 354 U. S. 449----------19
Mapp v. Ohio, 367 U. S. 343----------12, 14
People v. Dorado, 394 P. (2d) 952----------20
Preston v. U. S., 376 U. S. 364----------12, 14
State v. Burnius, 177 O. S. 155----------14, 16
State v. Cimpritz, 158 O. S. 490---------- 27
State v. Lett, 106 App. 285---------- 34
State v. Miles, 41 Abs. 1----------34, 35
State v. Presler, 112 O. App. 437---------- 27
State v. Wozniak, 172 O. S. 517---------- 27
Stoner v. California, 376 U. S. 364---------- 12, 14
U. S. v. Bayette, 299 Fed. (2d) 92----------16
U. S. v. Valentine, C C. Tenn., 202 Fed. Supp. 677----------11
Vecchio v. State, 8 Abs. 335----------35

TEXT.

47 American Jurisprudence, July 1967- July 1968 Supp., p. 74----------16

CONSTITUTION.

Constitution of the United States:
Fourth Amendment----------11, 12, 45
Sixth Amendment---------- 9, 21, 45
Fourteenth Amendment---------- 13, 45

STATUTES.

Ohio Revised Code:
Section 2901.01---------- 25, 26, 27, 46
Section 2941.30---------- 25, 26, 27, 46
Section 2945.10---------- 32, 34, 47
Section 2933.23---------- 11, 48

LAW OFFICES OF NAZOR & NAZOR

CASE NO. 41163

IN THE SUPREME COURT OF OHIO

APPEAL FROM
COURT OF APPEALS OF ASHTABULA COUNTY, OHIO

THE STATE OF OHIO
Plaintiff-Appellee

vs.

ROBERT LeROY PRUETT
Defendant-Appellant

MEMORANDUM IN SUPPORT OF JURISDICTION

STATEMENT OF FACTS.

The defendant-appellant, Robert LeRoy Pruett, hereinafter referred to as the defendant, was indicted at the September, 1964, Term of the Ashtabula County Grand Jury, recalled, for first degree murder for the killing of one Susan Osborne following the commission of rape. This indictment was brought under and by virtue of Section 2901.01 of the Revised Code of Ohio and during the course of the trial a motion was made by the Prosecuting Attorney to amend the indictment to have inserted after the words "in the perpetration of a rape", the words "or attempting to perpetrate a rape", this amendment being permitted under O.R.C. 2941.30 by the Court on February 11.

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1965, the trial of the case having commenced on February 1, 1965. (R. Vol.2, pp. 590-591).

The evidence showed that the defendant, Robert LeRoy Pruett, was a married man who had come to the City of Conneaut, Ohio, to live with his wife in the early summer of 1964; that he was without employment at that time and enrolled in a Manpower Training School in Ashtabula, Ohio, and was attending said school at the time of the alleged commission of the offense.

The evidence indicated that on occasion, the defendant and his wife frequented beer parlors and a short time prior to the date alleged in the indictment, to-wit: September 15, 1964, had made the acquaintance of the decedent, one Susan Osborne, who was seventeen (17) years of age. The evidence further indicated that the defendant and his wife had been in Susan Osborne's company on at least two (2) occasions prior to September 14, 1964, and that Susan Osborne at said times had been in the company of various men; that Susan Osborne, although being seventeen (17) years of age, frequented beer parlors until the early hours of the morning and was subject to little or no supervision from her mother with whom she lived in Conneaut. In other words, Susan Osborne was a person with far more worldly experience than the average girl of her age.

The evidence established that on the night of Monday, September 14, 1964, the defendant and his wife made the rounds of several beer parlors accompanied by one Norman Balcomb, a friend of the defendant. While on these rounds, they came in contact with the deceased girl, Susan Osborne, at a beer parlor and she accompanied them for the remainder of the evening. During the course of the evening the evidence showed that Susan Osborne consumed several drinks of rum and possibly some beer. At about midnight, defendant's wife, Marcia Pruett, who was pregnant, requested to be taken home. After this was done by the defendant and Balcomb, they proceeded to take Susan Os-

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borne to her home in Conneaut, Ohio. At that time, the evidence showed that it was suggested by Balcomb, who lived in Ashtabula, Ohio, that Susan Osborne ride to Ashtabula with the two young men and then the defendant would return her to her home in Conneaut. Pursuant to this arrangement these three people went to Ashtabula in Pruett's Ford automobile, Susan Osborne riding in the back seat with Balcomb and the defendant operating the automobile.

The evidence showed that Balcomb became familiar with Susan Osborne in the back seat of the car. Balcomb, who was a married man, was let out of the car at his home in Ashtabula and Susan Osborne got into the front seat of the automobile with Pruett. Pruett's testimony was to the effect that he had some conversation with the girl and that at a red light on Lake Avenue in Ashtabula, she opened the door and jumped out of the car. Pruett testified that he attempted to follow her, but there was traffic at this point and that he drove around for some time looking for her and that he finally drove home to Conneaut via Route 20 and arrived home at about 1:30 a.m. This testimony as to the time he arrived home was corroborated by the witness, Maxine Morgan the defendant's wife, and by the defendant's mother-in-law, Marjorie Clowes. The uncontradicted evidence of his wife was that there were no blood stains on his clothes and that he had no marks of violence on his body when he arrived home.

The defendant and his wife arose early the following morning when the defendant took his wife to work in Ashtabula and he himself went to the Manpower Training School. Marcia Pruett testified there was no evidence of any blood on the inside of the car.

On Saturday, September 19, 1964, Susan Osborne's nude body was found in some weeds lying about one hundred (100) feet from Lake Road in Ashtabula Township, this area being reached by a lane running south from Lake Road. The authorities were called and it was found that the girl had been dead for

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some time, that all of her clothing had been removed, a part of same lying on the ground near her and part of them folded neatly under her buttocks. Some of the clothing was quite bloody, the face and neck had started to decompose, some of the facial bones, the jaw and the hyoid bone were broken, there was profuse hemorrhaging around the larynx and trachea and there were multiple severe fractures of all facial bones and lower jaw. There was no evidence of forcible removal of the girl's clothing. (R. Vol. 1, pp. 166-167).

At the autopsy, a swab was made to determine the presence of absence of any seminal fluid and no seminal fluid or sperm cells were found. There were no bruises or injuries of any kind around the exterior genitalia or thighs of the deceased girl, which according to the testimony, contraindicated any evidence of force being used to compel her to submit to sexual relations. The evidence clearly showed on both sides of the case that there was no definite proof that the girl had engaged in sexual relations prior to or following her death. Dr. J. R. Higerd, the County Coroner, was unable to say that there had been any sexual assault. (R. Vol. 1, p. 167).

It was discovered on Sunday, September 20, 1964, by the authorities that the defendant was the last known person to have been with the deceased girl. He was picked up shortly before noon on Sunday, September 20, 1964, and was not given benefit of counsel. Deputy Sheriff Roach testified that when he questioned the defendant at the police station in Ashtabula shortly after having picked him up at his home, that the defendant told him that he had taken the girl to the scene of the crime but that she got out of the car and he started to get out after her and at that time he stopped talking and refused to talk further. There was no corroboration of Roach's story. The defendant vehemently denied that he had made this statement and stated that he had told the witness Roach that the deceased girl had gotten out of the

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car on Lake Avenue and that he started to get out after her, but did not on account of traffic. The evidence showed that Roach made no effort to write down any statement made at the police station and made no effort to call in any other officers to hear the alleged statement made by the defendant. Furthermore there was no evidence showing that the defendant was fully advised of his rights, particularly his right to remain silent and that anything he might say might be used against him.

The defendant was never released from custody following the time he was picked up by officers shortly before noon on September 20, 1964, and the defense maintains that he was placed under arrest when he was taken into custody at his home at said time. Later the same day, the defendant was further questioned by the officers and made no admissions of any kind as to guilt and requested that he be given benefit of counsel.

After the defendant's arrest and at a different place than the place where he was arrested, the defendant's Ford automobile, was taken by the proprietor of a private garage on the order of the Sheriff, to this private garage on the outskirts of Ashtabula, Ohio. Later in the same week, the exact time not appearing in the evidence, there were certain articles removed from the car, to-wit: a radio grille and a seat cover. A search warrant was never obtained by the authorities either prior to seizing the car on September 20th or prior to the searching of the car at an unknown subsequent time during that week.

This case came on for trial on February 1, 1965, the trial being concluded on February 23, 1965. A motion was made by the defense that the defendant be discharged at the conclusion of the State's case which was overruled by the Court, this motion being renewed at the conclusion of all the evidence, same being overruled by the Court. The case was submitted to the jury at 3:30 p.m. on February 23, 1965, and the jury returned a verdict of

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guilty of murder in the first degree without mercy at 6:18 p.m. on the same day, having deliberated only two hours and 48 minutes, although the case had taken approximately three (3) weeks to try.

A motion for a new trial was duly filed and argued at length and same was overruled by the trial Court. An appeal was taken on questions of law to the Court of Appeals and on the 23rd of June, 1967, a journal entry was filed in the Court of Appeals affirming the judgment of the lower court, the Court of Appeals writing a very brief opinion and failing to touch upon many of the important constitutional questions raised in this case.

This Memorandum is being filed in this Court seeking to have this Court take jurisdiction of this case by reason of the fact that the case did not originate in the Court of Appeals, and contains issues of law of public or great general interest, and involves substantial constitutional questions.

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QUESTIONS OF LAW PRESENTED.

The questions of law and constitutional questions presented by this appeal are as follows:

(1) A seizure and search of a defendant's motor vehicle without a search warrant and not made contemporaneously with the time and at the same place of the arrest is in violation of the 4th Amendment to the U. S. Constitution, and any alleged evidence obtained as a result thereof should be suppressed and the admission of said evidence at the trial of the cause constitutes reversible error.

(2) Where the investigation in a criminal case is no longer a general inquiry into an unsolved crime, but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations which lends itself to eliciting incriminating statements, not having effectively warned the suspect of his absolute constitutional right to remain silent; no statement elicited by the police during said interrogation may be used against him at a criminal trial, as said interrogation and said resulting statement being admitted into evidence constitutes a violation of the 6th Amendment to the Federal Constitution and thereby said admission of said evidence constitutes reversible error. See Escobedo v. Illinois, 32 O. O. (2d) 31. Also 378 U. S. 478 (1964).

(3) Where a juror, prior to being sworn as a juror and permitted to sit in the case, makes the statement to other prospective jurors that he is of the opinion that the defendant is guilty, the defendant is deprived of a fair and impartial trial under the 6th Amendment to the Federal Constitution.

(4) Where an indictment alleges murder in the first degree while in the commission of rape, it is error for the trial Court to permit the indictment to be amended to include a second and separate offense of murder

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in the first degree while attempting to commit rape. The indictment, however, having been so amended, it is error for the trial Court to submit such indictment to the jury, and it is further error for the jury to return a verdict of guilty generally to the indictment which included two offenses, the two offenses being inconsistent, one with the other.

(5) It is error for the Court to permit rebuttal evidence by the State when in fact said evidence rebuts no part of the evidence of the defense. This evidence having been admitted in rebuttal, it is further error for the Court to refuse the defendant the right to surrebuttal, that is to say, to present evidence refuting the evidence introduced in the State's rebuttal.

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REASONS WHY CASE CONTAINS ISSUES OF LAW OF PUBLIC OR GREAT GENERAL INTEREST AND SUBSTANTIAL CONSTITUTIONAL QUESTIONS

(1) A seizure and search of a defendant's motor vehicle without a search warrant and not made contemporaneously with the time and at the same place of the arrest is in violation of the 4th Amendment to the U. S. Constitution, and any alleged evidence obtained as a result thereof should be suppressed and the admission of said evidence at the trial of the cause constitutes reversible error.

We contend that the search and seizure of the defendant's Ford automobile was unlawful in that it was conducted in violation of the 4th Amendment to the Federal Constitution and, therefore, the car itself was erroneously admitted into evidence as was also certain material taken therefrom.

U.S. v. Valentine, C C. Tenn. (1962) 202 Fed. Supp. 677 holds that the 4th Amendment must be given broad and liberal construction in favor of the individual citizen in order to thwart illegal invasion of constitutional safeguards to the end that this Amendment may at times defend the guilty, but may also protect the innocent.

The 4th Amendment to the Federal Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

O.R.C. 2933.23 provides as follows:

> "A warrant for search shall not be issued until there is filed with the judge or magistrate an affidavit particularly describing the house or place to be searched, the person to be seized, the things to be searched for and seized, and alleging substantially the offense in relation thereto, and that the complainant believes and has good cause to believe that such things are there concealed, and he shall state the facts upon which such belief is based. The judge or magistrate may demand other and further evidence issuing such warrant. If the judge or magistrate is satisfied that grounds for the issuance of a warrant exist or that there is probable cause to believe

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that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched."

Under the evidence in this case, to-wit: that the defendant's automobile was standing in the driveway of the house in which he was living at the time he was taken into custody by the police; that he was subsequently taken to jail in Jefferson, Ohio; that the car was then removed to a place other than the place where the defendant was taken into custody, that at least several days after the defendant was incarcerated, the car was searched; that at no time during this procedure was a search warrant issued; and that certain items taken from the car were later introduced into evidence, and the car itself was introduced into evidence over the objection of the defendant, both by way of motion to suppress and an objection at the time of the trial, it is submitted that the search and seizure of the defendant's automobile was illegal and the subsequent admission in evidence of the car itself and the portion of the interior taken from the car was likewise improper being in violation of the 4th Amendment to the Federal Constitution.

In support of this contention we wish to refer the Court to Fahy v. Connecticut, 375 U. S. 85, (1963); wherein the Court said:

> "Where evidence which has been found as a result of an illegal search, has not been suppressed on request and has been erroneously admitted against a defendant, a conviction should be set aside if it appears that there is a reasonable possibility that the admission of such evidence contributed to the conviction." See also Stoner v. California, 376 U. S. 483; Preston v. U. S., 376 U. S. 364; Mapp v. Ohio, 367 U. S. 343 (1961).

In the instant case the admission into evidence of the car itself and the portion of the interior taken from the car, found as the result of the illegal search was not suppressed on motion of the defendant made prior to the trial. It is established now that in the light of the decision in the Mapp

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case and Ker v. California, 374 U. S. 23 (1963), that the 14th Amendment of the United States Constitution picks up the 4th Amendment, and applies it to state courts, including the federal standards that have developed thereunder. The 14th Amendment of the United States Constitution reads in part as follows:

> ". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws."

It is the contention of the defendant that the search and seizure of his automobile in order to have been legal must have been made substantially contemporaneous with the arrest as to time and place. The search and seizure also must be incidental to a lawful arrest. The leading case here is Agnello v. U. S., 70 L. Ed. 145 (1925). In this case the defendant was arrested in the house of a man named Alba. He was taken to the police station and while being interrogated, other officers went to Agnello's house and, without a warrant, searched for and seized a quantity of cocaine. During the trial of the case, the State attempted to use the cocaine in evidence, but it was excluded by the Court. In its opinion the Court said:

> "Frank Agnello's house was several blocks distant from Alba's house, where the arrest was made. When it was entered and searched, the conspiracy was ended, and the defendants were under arrest and in custody elsewhere. That search cannot be sustained as an incident of the arrest."

The Agnello case is important because of several later cases which relied on the distinction which the Court made between a search and seizure being made in the vicinity of the arrest and about the same time, and a search and seizure made at a place different than the arrest and at a different time. In the Agnello case, the arrest was at the house of a man named

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Alba, and yet the search and seizure was at a different house and later in the same day. In the case of Stoner v. California, 84 S. Ct. 889 (1964), where a room of a guest of a hotel was searched without a warrant, the Court excluded evidence obtained in the search as the search was not an incident to the arrest. The Court in citing and relying on the Agnello case laid down the basic test in this area as to what is "incident to an arrest". In this connection the Court said:

> "But a search can be incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest." (Underscoring supplied) Agnello v. U. S., 46 S. Ct. 4.

Soon after the Stoner and Preston cases, the Ohio Supreme Court spoke unanimously on this subject. In the case of State v. Burnius, 177 O. S. 155, (decided December 23, 1964), the entire Court speaking through Taft, C. J. said:

> "The Supreme Court of the United States has held that the Fourteenth Amendment to the Constitution of the United States now requires a state court to suppress any evidence, no matter how reliable, acquired as a result of an unreasonable search. This represents a departure from its previous decisions on this precise question. (Mapp v. Ohio, (1961) 367 U. S. 643, 672). However much the writer may disagree with the most recent holding of the Supreme Court on this question or question its wisdom or soundness, we are required to follow it just as we followed its previous holding on the same question. (See State v. Mapp 170 O. S. 427).
>
> "The search of defendant's automobile, having been made after the possessor of the automobile had been arrested and removed with the automobile to the police station, cannot be justified as incident to a lawful arrest." (Preston v. U. S. (1964) 376 U. S. 364.)"

The defendant objected at every stage of the proceedings to the illegal search and seizure and the admission of evidence resulting therefrom. A motion to suppress the evidence illegally obtained was filed prior to the actual trial of the case. This motion was sustained by the Court, a portion

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of his opinion being as follows, to-wit:

> ". . . we have to recognize that under the circumstances shown Pruett has an interest in the car sufficient to let him object and raise the issue concerning this search, the next question being whether or not in the light of the recent decisions this was a lawful search. Well, I don't think too much need be said on that either.
>
> ". . . I think the thing that makes the difference is that after the arrest, and by the way, the transcript shows that the affidavit was filed on the 20th, the same day as the arrest, the evidence in this motion shows that the search was not made until some time during the following week, and it hasn't been specifically pointed up as to when.
>
> "Now after the car was in possession of the law, certainly then a search warrant could have been obtained easily enough. It wasn't, and of course, that is the issue we are dealing with. Was it necessary? While I may have some personal opinions about some of these rules, I have to follow what I plainly see and I don't see how this search under these circumstances, in view of these rules or the rule as announced in several of these cases, can be justified.
>
> "The motion to suppress will be sustained and the prosecution ordered to return the car, the radio and the piece of the seatcover."

Immediately following the hearing on the motion to suppress, a motion was filed by the State to re-open the hearing which was granted by the Court. The only additional testimony given on behalf of the State was that it had evidence to prove that the automobile was an instrument or implement used in the commission of the crime. (R. Vol. 1, p. 116). The Court thereupon re-opened the hearing, reversed its former holding, and when the automobile and the parts taken therefrom were offered in evidence at the trial, same was admitted over the objection of the defendant. It is submitted that the mere fact that the deceased girl might have been transported in the car during the night of the alleged murder, did not make the automobile an instrument or implement used in the commission of the crime. Furthermore, this evidence was available at the first hearing on the motion.

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The Court in reversing itself stated that the automobile could be searched and seized because the officers had "probable cause to believe that a motor vehicle has been used in connection with the commission of the crime, not necessarily the instrumentality alone by means of which the death is caused . . ." (R. Vol. 1, p. 153). The Court did not hold that the automobile was an instrument or implement in connection with the commission of the crime, but only that the officers had probable cause to believe the automobile had been used in connection with the commission of the crime, completely ignoring the decisions of the United States Supreme Court previously cited in this Memorandum and the Burnius case.

Nowhere does the law warrant seizure and search of an object which is used in connection with the commission of the crime without a search warrant. The car itself and the material taken therefrom were purely evidentiary matters, and, therefore, were improperly admitted into evidence. With reference to the seizure of purely evidentiary matters, a good summation of the legal principle involved here is contained in 47 Am. Jur. Supp. pp. 69-70, wherein it is stated:

> "Thus it is clear that a search of premises without a warrant, made in connection with a lawful arrest, is not by nature an unlawful search, nor is it by its nature lawful; the right to make such a search is a strictly limited one; only a reasonable search is permissible, and the bounds of reasonableness are overstepped when (1) the premises searched are separated from the place where the arrest was made or (2) the search is a 'general' and 'exploratory' one; or (3) the search has as its purpose the seizure of things to be used purely as evidence (as distinguished from the fruits of the crime--such as stolen property--and the means by which it was committed) . . ." (Underscoring supplied.)

Two recent Supreme Court cases which distinguish between instrumentalities and evidentiary matters are U. S. v. Bayette, 299 Fed. (2d) 92 and Abel v. U. S., 4 L. Ed. (2d) 668. When the instant case was tried, the

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car, radio grille, and seatcovers were all admitted in evidence over the objection of the defense, the same arguments being advanced at that time that were advanced at the hearing on the motion to suppress, but the trial Court entirely ignored the ample authorities dealing with unlawful search and seizure and admitted all of the exhibits.

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(2) Where the investigation in a criminal case is no longer a general inquiry into an unsolved crime, but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations which lends itself to eliciting incriminating statements, not having effectively warned the suspect of his absolute constitutional rights to remain silent, no statement elicited by the police during said interrogation may be used against him at a criminal trial, as said interrogation and said resulting statement being admitted into evidence constitutes a violation of the 6th Amendment to the Federal Constitution and thereby said admission of said evidence constitutes reversible error. See Escobedo v. Illinois, 32 O.O. (2d) 31. Also 378 U. S. 478 (1964).

At the police station after the defendant's arrest, he was questioned by Deputy Roach, who testified that the defendant told him that he had taken the deceased girl to the scene of the crime, that she got out of the car, that he started to follow her, and then he allegedly said, "I didn't do it. I didn't do it.", and then refused to speak further. (R. Vol.2, pp. 527, 530, 840, 843). This statement the defendant vehemently denied making.

With reference to the constitutional guarantee of the right to remain silent when a general inquiry has begun to focus on a particular suspect, the suspect has been taken into police custody, the police ca... out a process of interrogations that lends itself to eliciting incriminating statements, and the police have not effectively warned the suspect of his absolute constitutional right to remain silent, in violation of the 14th Amendment to the Federal Constitution, no statement elicited by the police during the interrogation may be used against him at a criminal trial, in accordance with the decision of Escobedo v. Illinois, 32 O.O.(2d) 31, 378 U.S. 478(1964).

The only evidence concerning the foregoing was that of Deputy Roach and is as follows, to-wit:

> "I told him that I knew that he had been in the presence of this girl and of how terrible this crime is and I asked him if he wanted to talk to me about it and I advised him that he didn't have to say anything to me until he got an attorney. He could call whoever he wanted for help, but I felt sure if he was involved in this it would be best if he would tell me about it." (R. Vol. 2, p. 445.)

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This testimony of Roach was uncorroborated.

At no place in the Record was the defendant ever told that he had the right to remain silent and that anything he might say could be used against him. This rendered any alleged statement inadmissible. See Alexander v. Green, 2 O. S. (2d) 231 (1965). The Alexander case was decided after the instant case was tried, and the Court held that before a voluntary statement of a defendant may be used in evidence, he must first be advised that anything he might say may be used against him.

We submit that any statement elicited from the defendant in the police station by Roach was illegally obtained and constituted a violation of the defendant's constitutional rights. Although the alleged statement made by the defendant was not a confession, it was an admission against interest. A leading case on this is Mallory v. U. S., 354 U. S. 449.

In the Mallory case the defendant was a 19 year old lad of limited intelligence who was arrested by the police on suspicion of rape. Even though the police had ample evidence from other sources than the defendant for regarding him as a chief suspect, they first questioned him for approximately one-half hour then asked him to submit to a lie detector test and to another test after four more hours of detention. He was not told of his right to counsel or to preliminary examination before a magistrate, nor was he warned that he might keep silent and that any statement made by him might be used against him. The defendant in the Mallory case was convicted and the death penalty imposed. The Circuit Court affirmed the conviction and the United States Supreme Court reversed it by a unanimous decision. Justice Frankfurter's opinion was as follows:

> "The arrested person may be 'booked' by the police. But he is not to be taken in to police headquarters to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt."

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The most recent decision which would be applicable to our case on this proposition is the case of Escobedo v. Illinois, 378 U. S. 478 (1964). In this case a murder conviction was reversed by the United States Supreme Court, the following language being used in the syllabus of the case, to-wit:

> "We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, * * * * and the police have not effectively warned him of his absolute constitutional right to remain silent, * * * * and that no statement elicited by the police during the interrogation may be used against him at a criminal trial."

Following the Escobedo case is the California Supreme Court case of People v. Dorado, 394 P. (2d) 952 (1964). In reversing a murder conviction, the Supreme Court of California relied on the Escobedo rationale holding among other things that the failure of the police to advise the defendant of his right to remain silent was in violation of the Federal Constitution and rendered any statement which he had made inadmissible.

The provisions of the Federal Constitution which we claim have been violated by the admission of the alleged statement made by the defendant, are the 14th Amendment to the Federal Constitution which provides in part:

> ". . . nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction equal protection of the law."

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(3) Where a juror, prior to being sworn as a juror and permitted to sit in the case, makes the statement to other prospective jurors that he is of the opinion that the defendant is guilty, the defendant is deprived of a fair and impartial trial under the 6th Amendment to the Federal Constitution.

The 6th Amendment to the Federal Constitution provides in part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . . "

In determining and defining the word "impartiality" the following language is used in Dennis v. U. S., (1950) 70 S. Ct. 518, 339 U. S. 162:

> "'Impartiality' is not a technical conception but is a state of mind, and for ascertainment of such mental attitude of appropriate indifference, this amendment guaranteeing impartial jury lays down no particular test for procedure and is not chained to any ancient and artificial formula."

In the instant case we feel that it was clearly shown that the juror Gillespie was guilty of the grossest kind of misconduct when he stated unequivically on his examination as a prospective juror that he had not formed or expressed an opinion regarding this case. (R. Vol.2, P. 13). He made the statement again, (R. Vol. 2, p. 14), stating that he could be a fair and impartial juror and that he would be one hundred percent neutral if permitted to sit. Again he testified to the same effect on examination by the Prosecutor. (R. Vol. 2, pp. 20-21). On examination by defense counsel he was asked:

> "Do you have an opinion right now as to his guilt or innocence?"

and his answer was:

> "No sir, I do not." (R. Vol. 2, p. 24).

He was further asked by defense counsel:

"Q. But you are sure that there were no accounts that you read or anything that you heard anybody else say that would cause you to form

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an opinion as to the merits of this case?

"A. No sir."

Later in Mr. Gillespie's testimony (R. Vol. 2, p. 27) he was examined by the Court as to the condition of his wife who he had previously testified was ill and might of necessity have to be taken to the hospital at any time. The Court asked him:

"Q. Let's get at it this way then. How do you feel about it? Do you feel that you could serve in the light of this circumstance or that you could not? We will go from there.

"A. I feel as though I could. If either law enforcement agency or someone would be notified in case of emergency and the boy couldn't be located, that she would be rushed to the hospital because when she gets these attacks she can't breathe. The bronchial tubes close and as long as someone could get her there, I feel I could serve." (R. Vol. 2,pp. 33-34).

The above question and answer is set forth here to show the extreme anxiety on the part of Mr. Gillespie to serve as a juror which ties in with the statements the defense proved that he made before being sworn as a juror showing his prejudice.

The affidavit and testimony of Gene R. Osborne who was a panel member but who was not finally selected to sit as a juror, was to the effect that the juror Gillespie prior to being called for voir dire examination stated on several occasions within Mr. Osborne's hearing, that in his opinion Robert LeRoy Pruett was guilty of the crime for which he was charged and at a later time shortly before Gillespie was called into the jury box, he expressed his opinion very clearly that he thought Pruett was guilty and that he was anxious to serve on the jury because he wanted to see him found guilty. Mr. Osborne not only gave his affidavit which was admitted in evidence but he testified to substantially the same things that were covered in his affidavit. (R. Vol. 2, Supp. pp. 2-28). In his testimony he stated that he heard Gillespie state his opinion several times prior to being sworn as a

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juror, and he testified that Gillespie said he thought the defendant was guilty and there were other people around in the vicinity, although he could not tell exactly who they were but he believed prospective jurors Shannon and Ball were there. His testimony is replete both with statements on direct and cross-examination that he heard Gillespie say he thought the defendant was guilty and although the Prosecutor on cross-examination tried to shake him in this regard, he insisted throughout his cross-examination that he had heard these statements.

Another prospective juror who was not finally selected to sit but who was on the panel was William Shannon, who was called by the State on the hearing of the motion for a new trial. He stated on cross-examination (R. Vol. 2, Supp. p. 62), that he heard Gillespie state before he was finally chosen as a juror that he would like to sit on the jury, which simply adds to the misconduct of the juror who has formed an opinion, has expressed it and then makes the statement he wants to sit on the jury. How could any Court say that such a man could be fair and impartial?

The Court in his opinion overruling the motion for a new trial would not admit the affidavit of the juror Vivian Hall, this affidavit being to the effect that the jurors freely discussed the evidence in the case after they had been sworn as jurors and during the progress of the trial.

The affidavit of Mrs. Hall is replete with derogatory statements made by various members of the jury regarding the defendant and in particular statements made by the juror James Gillespie, who said at one time that he thought the defendant was guilty and as the case progressed, he said at various times in substance "my mind hasn't changed". Mrs. Hall's affidavit stated that on one occasion in response to what Mr. Gillespie had said, Mrs. Hall said in substance, "What do you mean, your mind hasn't been changed?". Mr. Gillespie said in substance, "Can't you see the man is guilty?". It

LAW OFFICES OF NAZOR & NAZOR

must be borne in mind that all of the matters contained in Mrs. Hall's affidavit took place prior to the final submission of the case to the jury, some of the occurrences transpiring outside the jury room.

The matters contained in the affidavit and testimony of Gene R. Osborne were not instances occurring after Gillespie had been sworn as a juror, but rather all of these matters occurred prior to his final selection as a juror. Following the statements mentioned above, he took the jury box and on his voir dire swore that he had no opinions and could be a fair and impartial juror. Can it be said, in view of this clearly proven misconduct on the part of Gillespie that the defendant had a fair and impartial trial by a fair and impartial jury? We emphatically say that it cannot.

In the case of Carr v. State, 22 O. App. 78, the Court said:

> "Juror who, on his voir dire in bribery prosecution, falsely stated that he had not formed or expressed an opinion as to accused's guilt, held not qualified as juror, and conviction must be reversed."

There are other Ohio citations too numerous to set forth in this Memorandum.

The trial Court held in overruling the motion for a new trial that the affidavit of Vivian Hall was inadmissible because evidence aliunde had not been offered. It is submitted that the testimony of the prospective juror, Gene R. Osborne, who was never sworn as a juror, was sufficient evidence aliunde to have permitted Mrs. Hall's affidavit to have been admitted in evidence and to have been considered by the Court. The evidence of Gene R. Osborne both by affidavit and by way of his testimony was evidence as to matters occurring before the jury was finally sworn and had to do with misconduct, particularly of Mr. Gillespie, and we submit this evidence was sufficient to have afforded the trial Court the right to consider Vivian Hall's affidavit, and it also being in our opinion amply sufficient for this Court to assume jurisdiction.

LAW OFFICES OF NAZOR & NAZOR

(4) Where an indictment alleges murder in the first degree while in the commission of rape, it is error for the trial Court to permit the indictment to be amended to include a second and separate offense of murder in the first degree while attempting to commit rape. The indictment, however, having been so amended, it is error for the trial Court to submit such indictment to the jury, and it is further error for the jury to return a verdict of guilty generally to the indictment which included two offenses, the two offenses being inconsistent, one with the other.

It is contended that the Court erred in permitting the indictment in this case to be amended. (R. Vol. 2, pp. 589, 590, 591).

The indictment as returned by the Grand Jury reads as follows:

"State of Ohio, Ashtabula County, SS. In the Court of Common Pleas Ashtabula County, Ohio, of the Term of September in the Year of Our Lord 1965 recalled, the jurors of the Grand Jury of the State of Ohio within and for the body of the County of Ashtabula, impaneled, sworn and charged to inquire of crimes and offenses committed within the said County of Ashtabula in the name and by authority of the State of Ohio upon their oaths do find and present that one Robert LeRoy Pruett, late of said County, on or about the 15th day of September, in the Year of Our Lord 1964, with force and arms in said County of Ashtabula and State of Ohio, did unlawfully, purposely and while in the perpetration of a rape kill Susan Osborne, contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the State of Ohio." The amendment to the indictment permitted by the Court consisted of the insertion of the following words, "or attempting to perpetrate a rape" immediately following the words "in the perpetration of a rape."

The indictment in this case was brought under O.R.C. 2901.01, a portion of which Statute reads as follows:

> "No person shall purposely, either of deliberate or premeditated malice, or by means of poison, or in perpetration or attempting to perpetrate rape, arson, robbery, or burglary, kill another."

O. R. C. 2941.30 provides for the amending of an indictment and

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reads in part as follows:

> "The Court may at any time before, during, or after a trial amend the indictment, information, or Bill of Particulars, in respect to any defect, imperfection or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime."

The reading of O. R. C. 2941.30 clearly indicates that no change in the name or identity of the crime charged may be permitted by amendment and this Section does permit amendment "in respect to a defect, imperfection or omission in form or substance, or any variance with the evidence, . . ." The Record does not disclose that the Prosecutor advanced any reasons why he decided to amend the indictment, the arguments of counsel on both sides not appearing in the Record. However, defense counsel strongly argued against the amending of the indictment for the following reasons, to-wit:

(1) A new crime was added to the indictment, to-wit: "while attempting to commit rape."

(2) The amendment could not possibly have been made "in respect to any defect, imperfection or omission in form or substance, or an any variance with the evidence . . ."

In discussing our first ground of objection, the reading of the Statute under which the indictment was brought, to-wit: O.R.C. 2901.01, discloses that there is a crime of killing another in perpetrating rape and also a crime of killing another in attempting to perpetrate a rape. The indictment as originally returned by the Grand Jury properly charged the crime of murder in perpetrating a rape. There was no defect, imperfection or omission in form or substance in the original indictment. Therefore, it could not be amended with respect to these matters. If the Grand Jury failed to indict for murder while attempting to commit a rape, this could have been remedied by the recalling of the Grand Jury and the returning of another indictment. However, it is submitted that this new offense could not be added to the

LAW OFFICES OF NAZOR & NAZOR

original indictment because this would be contrary to O. R. C. 2941.30.

With reference to our second ground of objection to the amending of the indictment, a careful reading of the Record will clearly disclose that the indictment could not possibly be amended in respect to any variance with the evidence. It was not proven by the evidence in this case that a rape was committed and there was absolutely no evidence in the case that a rape was attempted. However, it may be stated at this point that the uncontradicted facts in this case contraindicate an attempt to rape and likewise, contraindicate the actual rape itself as alleged in the original indictment. See State v. Wozniak, 172 O. S. 517, State v. Cimpritz, 158 O. S. 490, State v. Presler, 112 O. App. 437. Also see Harris v. State, 125 O. S. 257.

In the Harris case the Court said:

"The material and essential facts constituting an offense are found by the presentment of the grand jury; and if one of the vital and material elements identifying and characterizing the crime has been omitted from the indictment such defective indictment is insufficient to charge an offense, and cannot be cured by the Court, as such a procedure would not only violate the constitutional rights of the accused, but would allow the Court to convict him on an indictment essentially different from that found by the grand jury."

The following language is found in the Wozniak case:

"Any other holding in a case such as this would be inconsistent with the provisions of Section 10 of Article I of the Constitution of Ohio providing that 'no person shall be held to answer for' a crime such as this 'unless on presentment or indictment of a grand jury'. To require defendants to answer for the crime sought to be charged in count one of this indictment after amendment of the indictment by addition thereto of a missing charge of an essential element of that crime would be to require defendants to answer for a crime other than on 'presentment or indictment of a grand jury'. In order to justify conviction of a defendant for such a crime, the grand jury and

LAW OFFICES OF NAZOR & NAZOR

not the prosecutor, even with the approval of the Court, must charge the defendant with each essential element of that crime."

LAW OFFICES OF NAZOR & NAZOR

(5) It is error for the Court to permit rebuttal evidence by the State when in fact said evidence rebuts no part of the evidence of the defense. This evidence having been admitted in rebuttal, it is further error for the Court to refuse the defendant the right to surrebuttal, that is to say to present evidence refuting the evidence introduced in the State's rebuttal.

After the defendant had rested his case the State in rebuttal offered further evidence by way of the testimony of Rosemary Karr. (commencing R. Vol. 2, p. 1181). Mrs. Karr testified in substance that she and her husband lived in a house which in general abuts the southeast corner of the residence property of Maxine Morgan, the defendant and his wife living at that time at the Morgan residence. Mrs. Karr testified in substance that during the early morning of September 15, 1964, she was asleep in one of their bedrooms which was on the north side of their home and which had windows facing in the direction of the Maxine Morgan residence. She testified that about 2:30 a.m. she awoke and as she was quite awake, she turned on her radio. This testimony was objected to by the defense as not being rebuttal evidence but the objection was overruled. She testified that she laid awake and then Maxine Morgan's light went on, which consisted of a floodlight located over her back door. She said that a few seconds later she heard a door slam and saw Marcia Pruett, defendant's wife, run across the driveway to the east and down the Morgan driveway to the north and then to the east towards town. Her testimony was that this occurred at about 3:10 a.m. She also testified that this was a very nice, clear night. At this point defense offered strenuous objection asking that the testimony be stricken as not rebuttal which was overruled by the Court. (R. Vol. 2, pp. 1187-1188).

On cross-examination Mrs. Karr testified that there was a high hedge between her residence and the Morgan residence. (R. Vol. 2, p. 1192). She also testified on re-cross-examination that she had not related these facts to the authorities until two nights before she was called to testify in rebuttal. (R. Vol. 2, p. 1196).

LAW OFFICES OF NAZOR & NAZOR

The State thereupon rested and the defense at this juncture asked the Court to re-open its case to put in further testimony or, in the event that was denied, for the right to offer surrebuttal evidence refuting in particular the testimony of the State's rebuttal witness, Rosemary Karr. (R. Vol. 2, pp. 1215-1221). The defense directed the Court's attention to O.R.C. 2945.10, which sets out the order of proceedings in a criminal case, and which provides in part:

> "(D) The State will then be confined to rebuttal evidence, but the Court, for good reason, in furtherance of justice, may permit evidence to be offered by either side out of its order.
>
> "(G) . . . The Court may deviate from the order of proceedings listed in this section."

After the defense brought to the Court's attention several authorities and discussed its position, the Court overruled defendant's motion and the defense proceeded by calling to the stand the witness Maxine Morgan. The Court permitted the witness to answer preliminary questions. However, the substance of her testimony was excluded and the defense placed the same in the Record by the method of asking a question, and when the same was objected to by the State and the objection sustained, proffering the answer.

In essence the proffered testimony of Maxine Morgan was to the effect that during the early morning of September 15, 1964, she was at her residence at 519 Liberty Street, Conneaut, Ohio, and was up and about until she retired at 2:30 a.m.; that after going to bed, she laid awake until approximately 3:45 a.m.; that during said period she heard no slamming of her back door; that her bedroom was on the first floor of the house and that her bed was within six (6) feet of the lower end of the stairway which leads to the second floor and fifteen (15) feet from the back door of her residence; that at about the hour of 3:10 a.m., of the morning of September 15, 1964, she was awake and that no person left her house; that when the floodlight

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on her back door is illuminated, it shines into her bedroom, but that on the morning of September 15, 1964, at about 3:10 a.m., the floodlight did not shine into her bedroom; that the stairs leading to the second floor of her house are creaky; and that at the back of her property along the southerly line of the same and in front of the Karr residence on September 15, 1964, there existed a high hedge approximately twenty (20) feet in height which during the month of September was very luxuriant. (R. Vol.2, pp. 1222-1235).

At this point the defense had its Exhibits G, H, I, and J marked for identification one of which was a photograph taken in Miss Morgan's back yard on September 7, 1964, exactly one week prior to September 14, 1964, with the camera pointing in a southeast direction showing the foliage which existed at that time on that portion of the hedge at the back of her property with the Karr house in the background, the remaining photographs being taken at a later time during the winter months when there was no foliage on the hedge but showing general views of the hedge with reference to the Karr residence and general views of the Karr residence, the Adamack residence, the Morgan residence, the back yard of the Morgan residence and the high hedge, all with reference to each other.

The defense then called Marjorie Clowes to testify for the same reason as the preceding witness. With the exception of several preliminary questions, the testimony of this witness was also excluded, and the Record was made up in the same fashion as with the witness Maxine Morgan. The proffered testimony in essence was as follows, to-wit: that Mrs. Clowes was the mother of Marcia Pruett; that her bedroom in the Morgan house was on the second floor a short distance from the top of the stairway and almost directly over the back door; that the stairs on the morning of September 15, 1964, were creaky and that on said morning at or about 3:10 a.m. no one left the Morgan house or slammed the back door and that she was awake during the

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entire evening and during the early morning until approximately 3:30 a.m. (R. Vol. 2, pp. 1231-1243).

The defense then offered three witnesses: Wilber P. Dyer, John Tyler and David Weir, on the same basis as the preceding witnesses, namely, to rebut the testimony of the State's witness, Rosemary Karr and the Court excluded the testimony of these three witnesses and the testimony was proffered by the defense in the same fashion as was done with the witnesses, Morgan and Clowes. (R. Vol. 2, pp. 1242-1264).

It is the contention of the defense and was strongly urged during the trial that the evidence of the witness Rosemary Karr was not rebuttal evidence and should not have been permitted after the defense rested. If it had any value at all to the State, its value would have been as direct evidence because apparently what the State was trying to imply by this evidence was that the defendant was not home at 3:00 a.m. on the morning of September 15, 1964, and that his wife left the house in an effort to find him. Had this been presented in chief, which would have been the proper time, there would have been no question about the right of defense to present its evidence in opposition in the defense in chief.

Be that as it may, the Court did permit this evidence to be introduced as rebuttal evidence which we submit was highly improper, the jury having heard this evidence. However, in furtherance of justice and by virtue of O.R.C. 2945.10, we feel that it was the duty of the Court to exercise its discretion liberally towards the defendant and not take the narrow view which was taken by the Court. The Court went so far as to permit the defendant and his wife to testify in what may be called surrebuttal but then cut the evidence off and did not permit the disinterested witnesses offered by the defense to testify. This we submit as one of the grossest errors against this defendant and was certainly a flagrant abuse of the Court's discretion.

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In support of our contention, we would like to refer to several Ohio authorities.

In the case of Itskin v. State, 51 App. 211 (1953), the Court said:

> "The other error complained of in the Itskin case relates to certain rebuttal, which the defense contends was not proper rebuttal, and should have been offered in chief."

The record in the Itskin case discloses no objection to the witness being called for rebuttal, and the Court then permitted Itskin to call a witness for surrebuttal. There was no prejudicial error in what was done.

The Itskin case clearly holds that there exists in Ohio the right for the defense to submit surrebuttal in answer to rebuttal by the State in criminal cases. Further it would appear that the defendant went one step further in the instant case in improving his position over the Itskin case in that the defense objected to the State's so-called rebuttal evidence (Rosemary Karr) whereas in the Itskin case, the defense was permitted surrebuttal even though he did not choose to object to the State's rebuttal evidence.

Further in the Itskin case, it would appear that the rebuttal evidence offered actually was evidence that should have been offered in chief. The Court let the evidence in, however, in rebuttal, which is all the more reason why the defendant should have had the right to surrebuttal.

Another very important case in Ohio is the case of Donald v. State, 11 O.C.D. 483 (1900). In this case the Court said:

> "By the law of evidence testimony competent in chief, by that fact is rendered incompetent in reply. The rule, however, is subject to the discretional authority of a trial court to re-open a case in chief at any time before it is finally closed and let such evidence in. But this should not be done when without fault on his part, the reason of the discharge of witnesses, or otherwise, a party would be cut off from an answer to the new testimony, which he might have made if it had been regularly given.

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". . . I presume all trial courts have re-opened cases for the purpose of letting in, during the reply, new evidence that properly and strictly would be in chief. But in connection with that, the rule always has been, as we have understood and seen it applied that if the plaintiff re-opens, the defendant has a right to rejoin. (Underscoring supplied.)

In State v. Lett, 106 App. 285, (1958), the State put evidence on in rebuttal and the Court held:

"Inasmuch as the defendant first raised the issue and produced his evidence in support thereof, the State was entitled to an opportunity to rebut it. In doing so, the State introduced no new matter, so that there was no occasion for surrebuttal by defendant." (Underscoring supplied.)

This case again recognizes the right of the defendant to present surrebuttal if the State has instroduced new matter in its rebuttal testimony. A reading of the Record in the instant case clearly demonstrates that the testimony of Rosemary Karr was new matter.

With reference to the construction of O.R.C. 2945.10, the Court's attention is directed to the case of State v. Miles, 41 Abs. 1 (1943). In this case the Court permitted the State while in the midst of examining a rebuttal witness, to stop, re-open the defense's case in chief for further cross-examination of a defense witness and then go back to further examination of its own rebuttal witness. The Court in permitting this went back to the Statute which preceded O.R.C. 2945.10 and which was in effect in 1929 and provided:

"The State will then be confined to rebuttal evidence unless the Court for good reason in furtherance of justice shall permit it to offer evidence in chief."

The old Statute was much more liberal and it would not be difficult to see how the Court in the Miles case would reach the decision it did if it were operating under the Statute. However, the liberal form of this Statute was

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changed in 1929 and the Court in the Miles case (1943) still adhered to the liberal construction by allowing this evidence in chief. This case, therefore, stands for the proposition here that the Court, in addition to having the power to permit the defense to offer surrebuttal, could have also attacked the problem not through the doctrine of surrebuttal, but by virtue of the Miles case could have permitted the defendant to re-open his case in chief, and then offer his evidence in refuting the testimony of Rosemary Karr. In passing let it be said that all of these cases show a very broad power in the Court to permit justice to be done. It must be borne in mind that this was a first degree murder case wherein the defendant's life was at stake which is all the more reason for the Court exercising a wide discretion in furtherance of justice.

Another case decided since the present Statute has been in effect, which shows how far the Courts have gone in applying the wide discretion of the trial judge in furtherance of justice, is the case of Vecchio v. State, 8 Abs. 335 (1930), where the Court permitted the State to re-open the case and put in testimony as to the age of the defendant after the case had been submitted to the jury saying that, "We think it would have been great error on the part of the Court under such a situation to refuse the application of the State even at that point in the trial, to offer evidence concerning the defendant's age."

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CONCLUSION

It is, therefore, respectfully submitted that for the foregoing reasons, the decision of the Court of Appeals herein has raised issues of law of public or great general interest, and substantial constitutional questions, and, therefore, should be reviewed by this Court.

Respectfully submitted,

NAZOR AND NAZOR

ATTORNEYS FOR DEFENDANT-APPELLANT

I, Joseph E. Mahoney, Prosecuting Attorney of Ashtabula County, Ohio, hereby acknowledge receipt of a copy of the within Memorandum this day of , 1967.

JOSEPH E. MAHONEY
ATTORNEY FOR PLAINTIFF-APPELLEE
ASHTABULA COUNTY, OHIO

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PORTION OF THE RECORD CONTAINING THE ORAL RULING OF THE COMMON PLEAS COURT SUSTAINING THE DEFENDANT'S MOTION TO SUPPRESS THE EVIDENCE, WHICH RULING THE COURT SUBSEQUENTLY REVERSED.

I am of the opinion, in light of the theory expressed in Jones, United States Supreme Court, we have to recognize that under the circumstances shown Pruett has an interest in the car sufficient to let him object and raise the issue concerning this search, the next question being whether or not in the light of the recent decisions this was a lawful search. Well, I don't think too much need be said on that either.

This record doesn't show anything with respect to why the car was taken on the same day of the arrest other than there was some evidence that the car had fictitious plates on it; but it wasn't taken off the street. Well, in this testimony last given here by Balcomb, which I don't see as that has any bearing on it, he had no interest--a Third party had no interest in the car to grant any permission or issue any directions. So it seems to me applying the rule of the Preston case the search was not contemporaneous with the arrest either as to time or place.

Now the seizure apparently was. I would be inclined to think that the seizure was sufficiently timely from the evidence that I have heard, namely, that it was on the same day, within a matter of three or four hours, which I think is sufficient so far as the time element is concerned.

These cases don't hold that the seizure must be made at the instant of arrest. The language used in all these cases does not so indicate; but after all, the real predicate is, as I view it, under all the circumstances could a warrant reasonably have been obtained and still have come up with the same objective?

Now if that language is used in some of the opinions, I haven't see it, but it seems to me as a result of these opinions that is about what it amounts to. Without going into a lot of detail and illustrations, the

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right to search and to seize something from the person to prevent escape, assault, and to pick up and take possession of the evidence concerning the crime for which the arrest is made--that kind of thing--timewise, I think this could have been justified. Spacewise I still agree, I don't think that moving the car three blocks is the thing that makes the difference. I think the thing that makes the difference is that after the arrest, and by the way, the transcript shows that the affidavit was filed on the 20th, the same day as the arrest, the evidence in this motion shows that the search was not made until some time during the following week, and it hasn't been specifically pointed up as to when.

Now after the car was in possession of the law, certainlythen a search warrant could have been obtained easily enough. It wasn't, and of course that is the issue we are dealing with. Was it necessary? While I may have some personal opinions about some of these rules, I have to follow what I plainly see and I don't see how this search under these circumstances in view of these rules or the rule as announced in several of these cases, can be justified.

The motion to suppress will be sustained and the prosecution ordered to return the car, the radio, and the piece of the seatcover.

MR. H. NAZOR: Would that be broad enough to cover anything taken from the car? It is not within our knowledge, of course, anything they did.

THE COURT: Yes, and any other articles that were taken. There is no indication in the order that there was, but the order will so read. Mr. Nazor, you prepare and submit a journal entry accordingly.

JOURNAL ENTRY OF THE COMMON PLEAS COURT
OVERRULING MOTION TO SUPPRESS
(Filed: January 27, 1965)

This cause came on for hearing on January 21, 1965, the defendant being present and represented by counsel, upon the motion of the defendant

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to suppress the evidence seized bythe Sheriff in this case and to order a return to the defendant of the property mentioned in said motion, to-wit: a motor vehicle and any items taken therefrom by the State, and again on January 27, 1965, came on for further hearing, an application of the State to submit further evidence on said motion to suppress having previously been allowed by the Court, and same was argued and submitted.

Upon consideration of the evidence the Court finds that the defendant having physical possession of the motor vehicle in question and having a certificate of title thereto assigned to him by the previous owner therefore had sufficient status or standing in relation to the motor vehicle to raise the question of unlawful seizure and search of it, although he had not yet perfected his legal title thereto; that upon the defendant's being questioned by a Deputy Sheriff, the defendant stated enough to cause a reasonable belief by the Sheriff that said motor vehicle was used by the defendant in connection with the commission of the murder for which he was arrested and might well furnish some evidence of his guilt; that the seizure of said motor vehicle by the Sheriff was without trespass upon the curtilage of the defendant.

Therefore, it is the conclusion of the Court that the seizure of the motor vehicle was not unreasonable; that the search of it thereafter had does not violate either the 4th Amendment of the Constitution of the United States, nor Article I, Section 14 of the Constitution of the State of Ohio, nor any statute.

It is therefore ordered that said motion to suppress the evidence herein be and the same is hereby overruled. Exceptions of the defendant noted.

JOURNAL ENTRY OF COMMON PLEAS COURT
OVERRULING STATE'S MOTION TO AMEND THE INDICTMENT
(Dated: February 4, 1965)

This cause came on for trial February 4, 1965, at 9:15 o'clock

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A.M., pursuant to order of adjournment and then came Joseph E. Mahoney, Prosecuting Attorney, Charles M. Diamond, and Francis A. Frackette, Assistant Prosecuting Attorneys, on behalf of the State of Ohio, the defendant, Robert LeRoy Pruett being brought into court in the custody of the Sheriff and being represented in court by his counsel, Howard M. Nazor and Gordon L. Nazor; and also came the panel of jurors heretofore sworn and the two alternate jurors.

Whereupon the State moved to amend the indictment herein by adding the words, "or attempting to perpetrate a rape" after the words, "while in the perpetration of a rape" and said motion was argued and submitted. Upon consideration, said motion to amend is hereby overruled and the trial continues.

THAT PORTION OF JOURNAL ENTRY SUSTAINING
MOTION OF STATE TO AMEND INDICTMENT
(Dated: February 11, 1965)

Upon motion of counsel for the state, over objection of counsel for the defense, the indictment herein was thereupon amended by inserting therein after the words "in the perpetration of a rape" the words "or attempting to perpetrate a rape" so that the operative words of said indictment then provided as follows, omitting the formal parts thereof: "That one Robert LeRoy Pruett on or about the 15th day of September...1964, with force and arms in said County of Ashtabula and State of Ohio, did unlawfully, purposely, and while in the perpetration of a rape, or attempting to perpetrate a rape, kill Susan Osborne; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio..."

VERDICT--GUILTY
IN COMMON PLEAS COURT
(Dated: February 24, 1965)

We, the Jury in this case, duly impaneled and sworn and affirmed, find the Defendant, Robert LeRoy Pruett, Guilty of Murder in the First Degree,

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in manner and form as he stands charged in the Indictment.

(Signed)
Jean W. Maurice
Mary E. Augustine
James Finlayson
Winifred C. Bartko
Christine M. Colucci
Mildred E. Nielsen
Barbara C. Rhodes
Gloria J. Svec
James E. Gillespie
John J. Janda
Vivian B. Hall
Doris M. Glaus

James Finlayson
Foreman

SENTENCE ON VERDICT OF MURDER IN FIRST DEGREE
(Dated: March 27, 1965)

The defendant herein, Robert LeRoy Pruett, heretofore having been convicted of murder in the first degree in violation of R. C. 2901.01 was this day brought into open court in custody of the Sheriff and informed by the Court of the verdict of the Jury and inquired of if he had anything to say why judgment should not be pronounced against him and showing no good and sufficient cause why judgment should not be pronounced;

It is therefore considered and adjudged by the Court

That the defendant, Robert LeRoy Pruett, on the 18th day of August, 1965, and before the hour of sunrise of said day, within the walls of the Ohio penitentiary at Columbus, Ohio, be electrocuted by causing a current of electricity of sufficient intensity to cause death to pass through the body of said defendant, the application of such current to be continued until the said defendant is dead; and that the defendant be taken hence to the jail of Ashtabula County, and that within the next thirty days the Sheriff of Ashtabula County convey the said defendant, Robert LeRoy Pruett, to the Ohio penitentiary and deliver him to the warden thereof, and that at the time and place herein named the said warden cause a current of electricity of sufficient intensity to cause death, to pass through the body of the said defendant, Robert LeRoy Pruett, the application of such current to be continued until said defendant, Robert LeRoy Pruett, is dead; that the said defendant, Robert LeRoy Pruett, pay the costs of this prosecution and exe-

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cution is awarded.

JOURNAL ENTRY OF COMMON PLEAS COURT
OVERRULING MOTION FOR NEW TRIAL
(Dated: March 27, 1965)

This cause came on to be heard on the 17th day of March, 1965, the defendant, Robert LeRoy Pruett, being present in open court and represented by counsel of record, and same was argued and submitted upon only certain of the grounds set forth in the Motion for New Trial, that is:

1. Misconduct of the jury.

2. Abuse of discretion by the Court in sustaining objection to the introduction of the evidence offered by the defense on surrebuttal; and overruling objection of the defendant to the introduction of certain photographs of the body at the scene of the crime.

3. Overruling prior to trial the Motion of the defendant to Suppress Evidence.

4. That the verdict is contrary to law.

Thereupon, this cause was continued to March 27, 1965, at 9:30 A.M. for ruling upon the Motion for New Trial.

On this 27th day of March, 1965, the defendant again appearing in open court with counsel and the State of Ohio appearing by Joseph E. Mahoney, Prosecuting Attorney, and Charles M. Diamond and Francis A. Varckette, Assistant Prosecuting Attorneys, and after careful and due consideration of said Motion, same is hereby overruled in accordance with the Court's written opinion on file. Exceptions for the defendant noted.

JOURNAL ENTRY OF THE COURT OF APPEALS.
(Filed June 23, 1967)

At a Term of the Court of Appeals, Seventh Appellate District, within and for the County of Ashtabula, and State of Ohio, begun and held in the Common Pleas Courtroom at Jefferson, Ohio, on the 23rd day of March, 1966, before the Hon. Nils P. Johnson, the Hon. George M. Jones and the Hon.

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John J. Lynch, Judges, among other proceedings then and there had by and before said Court, as appears by its Docket, is the following to-wit:

State of Ohio, Plaintiff-Appellee, vs. Robert LeRoy Pruett, Defendant-Appellant, May 19, 1965, No. 598. This cause came on to be heard upon the bill of exceptions, the original papers and pleadings in the Court of Common Pleas of Ashtabula County, Ohio, and was argued by counsel.

On consideration whereof, of all the assignments of error the Court finds that there is no error prejudicial to the defendant-appellant apparent on the record, in said proceedings and judgment, and that, in its opinion, substantial justice has been done to the Party complaining, as shown by the record of the proceedings, and the judgment under review.

IT IS, THEREFORE, CONSIDERED BY THE COURT, that the judgement aforesaid be, and the same hereby is affirmed, and that the plaintiff-appellee recover from the defendant-appellant its costs herein expended, taxes at $_____.

That a Special Mandate be sent to the Court of Common Pleas of Ashtabula County, to carry this judgment and costs into execution, and it being made to appear to this Court that the day on which the said Robert LeRoy Pruett was, by said Court of Common Pleas, duly sentenced to be electrocuted, to-wit: the 18th day of August, 1965, is now past, and pending proceedings of this Court, stay of execution was granted to said Robert LeRoy Pruett, until finally disposed of by this Court, and until further order.

This Court proceeding as required by O.R.C. 2953.07, to appoint a day for the carrying of said sentence into execution, it is ordered and adjudged that said sentence of death by electrocution, pronounced and passed upon said Robert LeRoy Pruett, by said Court of Common Pleas of Ashtabula County, Ohio, be carried into execution by the Warden of the Ohio Penitentiary on the _____ day of _____, 1967, in accordance with the provisions of the Statute in such case made and provided, and that said

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Warden forthwith make due return thereof to the Clerk of the Court of Common Pleas of Ashtabula County, Ohio.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that a copy of this entry be certified to the Clerk of the Court of Common Pleas of Ashtabula County, for entry, and the defendant-appellant, Robert LeRoy Pruett, being now by order of this Court in the custody of the Warden of the Ohio Penitentiary, it is further ordered that a copy of this Entry and Warrant be duly certified to said Warden.

To all of which holdings, orders and judgment, the defendant-appellant, Robert LeRoy Pruett, excepts.

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STATE OF OHIO, ASHTABULA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
PLAINTIFF-APPELLEE,	)	OPINION
-vs-	)	Case No. 598
ROBERT LeROY PRUETT,	)	
DEFENDANT-APPELLANT.	)	

APPEARANCES.

Joseph E. Mahoney, Prosecuting Attorney, Jefferson, Ohio, for Plaintiff-Appellee.

Nazor & Nazor, Ashtabula, Ohio, for Defendant-Appellant.

Hon. Nils P. Johnson,
Hon. George M. Jones,
Hon. John J. Lynch, JJ.

Dated: February 6, 1967

Grace Marten,
Court of Appeals Reporter,
Mahoning County Courthouse,
Youngstown, Ohio.

JONES, J.

Appellant, Robert Leroy Pruett, hereinafter referred to as defendant, was indicted by the Grand Jury of Ashtabula County (September 1964 term), for first degree murder for the killing of Susan Osborne while in the commission of rape. The indictment was brought under and by virtue of R. C. 2901.01. During the course of the jury trial the Court permitted the prosecutor to amend the indictment by interlineating after the words "in the perpetration of rape" the words "or attempting to perpetrate a rape". This was done pursuant to Revised Code Section 2941.30.

The case came on for trial February 1, 1965. It was concluded on February 23, 1965. The jury returned a verdict of guilty of murder in the first degree without a recommendation of mercy.

Motion for new trial was duly filed, argued and overruled. The sentence and judgment is now before this Court for review. Execution of the sentence has been suspended, and defendant is in the Ohio Penitentiary pending disposition of his appeal.

It appears from the evidence that Pruett, a married man, lived in Conneaut, Ohio, at the time of the crime. The Pruetts had no children at the time, but there was some indication that Mrs. Pruett was pregnant. Pruett

was attending the Manpower Training School in Ashtabula, but was otherwise unemployed. Shortly prior to September 5, 1964, defendant first met Susan Osborne, who was then seventeen years of age, single, and who lived with her mother in Conneaut. On the night of September 14, 1964, the defendant, a friend named Balcom, and defendant's wife made the rounds of a few beer gardens. While on these rounds, they met Susan Osborne. Eventually, about midnight, defendant took his wife home and then took Balcom home to Ashtabula. Susan Osborne accompanied Balcom and Pruett from Conneaut to Ashtabula. Balcom was dropped off in his neighborhood in Ashtabula, and Pruett headed out with Susan Osborne in the Ford auto being used by Pruett that evening. This was the last time that anyone, other than Pruett, saw Susan alive. This was in the early hours of September 15, 1964. The only testimony available as to what happened to Susan is Pruett's. Pruett claimed at the trial that the two had an argument while seated in the auto and waiting for a light to change on Lake Avenue in Ashtabula; that Susan opened the door and got out of the car; that due to the traffic standing behind him he drove on and lost track of Susan; that he could not successfully follow her; that he drove around a bit looking for Susan, did not find her, and that he then headed for home in Conneaut, arriving there about 1:30 a.m.

On Saturday, September 19, 1964, Susan Osborne's

nude body was found in some weeds lying about one hundred feet from Lake Road in Ashtabula Township, in an area which can be reached by a lane leading south off Lake Road. The victim had a puncture wound in the chest and had been brutally beaten about the face and neck.

Defendant has made twenty assignments of error. Counsel specifically argued ten of the errors assigned, without abandoning the others, but claiming that some counts overlap in the assignment.

Defendant first claims irregularity in the proceedings of the trial court, (1) in permitting an amendment to the indictment, and (2) an abuse of discretion on the part of the trial court in refusing to grant defendant's request for a separation of witnesses at the hearing on the motion for a new trial.

First, as to the amendment to the indictment, defendant claims an additional charge, a new crime, has been added to the indictment. It can hardly be said that there has been a change in the identity of the crime. This is so irrespective of the fact that defendant claims that an actual rape had not been proved. Revised Code Section 2941.30 grants a trial court authority to permit an amendment to an indictment in form or substance, provided only that there are no changes in the name or identity of the crime.

Revised Code Section 2941.30, provides in part:-

> "The court may at any time before, during or after a trial amend the indictment, information, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged. * * *."

After close study we find no change in the name or identity of the crime. This assignment is not well taken. (See Bryant v. State of Ohio, 48 Ohio App. 208, and State v. Holt, 59 Ohio App. 309. The trial judge in the Bryant case had the same problem with murder and robbery, and permitted the change to "while attempting to commit a robbery").

As to the second contended irregularity, we are of the opinion that the trial judge did not abuse his discretion in not ordering a separation of witnesses during the hearing for a new trial. We hold this after a careful review of the testimony. The witnesses were jurors, some of whom had sat on the case and others who were on the venire but had been dismissed. Defendant contended at the hearing that there had been misconduct on the part of one of the jurors in response to a question put to that juror during voir dire. The judge properly considered the nature of the changes and rightfully permitted the juror-witnesses to be present at the hearing.

Defendant next assigned as error the prejudicial admission into evidence the testimony of officer Roach.

This, he claims, denied him the protection afforded him by the Constitution of Ohio and the Constitution of the United States with amendments. The facts giving rise to this issue do not seem to be in dispute. However, there is a disagreement between counsel for defendant and the trial court as to the applicability of some recent United States Supreme Court decisions and at least one Ohio Supreme Court decision to these facts. The police authorities learned from Balcom that Pruett had been with Susan Osborne, and apparently was the last to see Susan alive, on September 15th. Detective Roach of the Sheriff's Department testified at the trial that he had gone to Pruett's house on the 20th and had found Pruett home. Roach was accompanied by some other officers. Pruett was asked to go with the officers to the Ashtabula City Police Department. Pruett went voluntarily. Not much else was said at the Pruett house or on the way to the station. At the station, the group went to the basement, and then Pruett was taken into the police locker room by Roach. Roach then told Pruett that he knew that Pruett had been in the company of Susan Osborne on the 14th and 15th, that Susan Osborne had met with death, and that the crime was terrible. He asked Pruett if he wanted to talk, but said "that he didn't have to say anything to me until he got an attorney and he could call whoever he wanted for help." Following this Roach testified that Pruett told him that he had taken the girl to the place where the body was

found. Pruett then said several times "I didn't do it". There followed some disputed testimony as to the conversation between Pruett and Officer Roach in the Ashtabula City Police Station. At least the defendant and the state do agree that Roach did discuss with Pruett degrees of murder and punishments. This has led counsel for defendant to point out that an arrest had been made under the Henry Rule (Henry v. U. S., 4 L. Ed. (2d) 136). "An arrest is made the moment a man's movements are restricted and not when a formal arrest is made". Defendant argues that Pruett's movements had been restricted prior to this point, and, according to the Escobedo Rule (Escobedo v. Illinois, 378 U.S. 478), the process had shifted from being investigatory to being accusatory, and since the adversary system was then in process, the accused had to be afforded the right to consult with counsel. The facts clearly show that under the Henry Rule, Pruett had not been under technical arrest or otherwise. His movements had not been restricted, according to his own testimony. Escobedo is not applicable as Detective Roach advised Pruett that he could have an attorney, and Pruett could remain silent until then. Also, we distinguish Alexander v. Green, 2 Ohio St. (2nd) 231. The Green case turns on an arrest; Wong Sun (Wong Sun v. U. S., 371 U. S. 471) and the subsequent line of cases are distinguishable upon the facts. We are not involved with a verbal confession following an

unlawful arrest.

In the instant case there was no confession. Officer Roach was investigating a murder and was talking to Pruett, whom Blacom had last seen with the victim. Pruett's movements were not restricted, by his own testimony. The courts are merely trying to do away with improper police work and investigation that results in the deprivation of constitutional guarantees. They are not eliminating all investigation. The guide lines are most restrictive but not an abolition of all investigations. We conclude that the police work in this case must be commended.

The defendant raises as error the seizure and search of the Ford auto used by the Pruetts, Balcom and Susan Osborne. The trial court held that the seizure of the auto was valid as a seizure of an "instrumentality used in the commission of the crime". We concur with the trial court's reasoning, found beginning on page 151 of Volume 1 of the Bill of Exceptions. There is no need for further discussion on this point. This assignment of error is not well taken. (See also Hemmis v. State, 129 N. W. (2d) 209). Furthermore, the record indicates to this Court's satisfaction that the vehicle was seized incidental to a lawful arrest and, therefore, no search warrant was needed.

The twelfth assignment of error states that the verdict is not sustained by sufficient evidence; that the

court shall consider in this assignment whether or not the evidence shown the defendant guilty of first degree murder as found by the jury, and if not, whether the evidence supports a finding of guilty of a lesser degree, or of a lesser crime included in the charge. We have done as requested. This error, along with the others, has required hours of reading, re-reading and thought. So it is not lightly that we hold that there is sufficient evidence on each element of the crime to support a guilty verdict. A recounting of over 1,300 pages of testimony to support this finding is unwarranted. We conclude that the evidence was sufficient and proper to support the verdict of the jury. We urge the reading of the trial court's splendid, learned and detailed opinion, dated March 27, 1965. It is excellently done and most thorough. It was great help to this court, and will be to other reviewing courts.

All of the errors assigned have been considered. Defendant had the finest professional representation. We commend Attorneys Howard and Gordon Nazor. Defendant had a fair trial as constitutionally guaranteed to him. Thus, finding no error in the record prejudicial to the appellant, we must affirm the judgment and sentence of the trial court.

Judgment affirmed.

Johnson, P. J., Concurs.
Lynch, J., Concurs. See concurring opinion.

APPROVED:

JUDGE.

LYNCH, J., CONCURRING.

I concur in the majority opinion; however, this case presents a difficult constitutional question on search and seizure which I will discuss in detail.

In this case the evidence admitted into the trial of the case is sufficient to establish the guilt of defendant. However, the assignments of error of defendant that present the most difficulty in deciding this appeal is whether certain crucial matters admitted as evidence in this case were inadmissible as violating the constitutional rights of defendant because of recent United States Supreme Court decisions. If the admission into evidence of such matters violated the constitutional rights of defendant, the conviction of defendant must be reversed.

The assignment of error which I will discuss is 6(B), which is as follows: Was the motor vehicle of the defendant-appellant illegally searched and seized, no search warrant for same having been issued, and the seizure and search not being contemporaneous as to time and place with the arrest of the defendant?

The body of the victim was found on Saturday, September 19, 1964. The next day, which was a Sunday, Detective Sergeant Harold S. Roach of the Ashtabula County Sheriff's Department in the course of his investigation of this crime, asked the defendant to come to the Ashtabula

City Police Department for interrogation, and defendant went voluntarily. Officer Roach testified that during the course of the interrogation, which occurred shortly before noon, defendant admitted driving the victim to the scene of the crime in defendant's automobile, that he "made a couple of passes at her and she got out of the passenger side of the car", that defendant got out the same side and "an argument started", but that defendant said repeatedly "I didn't do it". (R. 448-449).

Officer Roach then placed defendant under arrest and took him to Jefferson, the county seat of Ashtabula County. Sheriff Tom Fasula was present when officer Roach and the defendant arrived at the County Jail, and Officer Roach discussed his interrogation of defendant with Sheriff Fasula. Sheriff Fasula then ordered defendant's automobile impounded. A deputy sheriff called Marrison Motors to go to Ashtabula to pick up defendant's car about 3:00 p.m. Defendant's car was located parked in the rear of the residence at 621 W. 38th Street, Ashtabula, Ohio. It was picked up by John W. Marrison pursuant to the order from Sheriff Fasula, and was taken to Marrison's garage.

On the following day, which was September 21, 1964, Officer Roach examined defendant's automobile at Marrison's garage and noticed a discoloration on the front seat. Officer Roach removed the part of the front seat upon which this discoloration was located (R. 485-487). This was sent to the Federal Bureau of Investigation Laboratory

which determined that the stain on defendant's front seat cover was human blood belonging to Group B, which was the same as the victim (R. 570). Officer Roach also found a stain on the grill of defendant's car, which was determined by the Federal Bureau of Investigation Laboratory to be human blood, but there was not enough blood within the smear to determine the type (R. 491, 569).

This issue, then, is whether, under the facts of this case, the seizure and search of defendant's automobile without a search warrant violated defendant's constitutional rights guaranteed under the Fourth Amendment of the United States Constitution and under Section 14 of Article I of the Ohio Constitution. Specifically, was the seizure and search of defendant's automobile without a search warrant "an unreasonable search and seizure" as prohibited by these constitutional provisions.

This writer has had five years experience in law enforcement as a special agent with the Federal Bureau of Investigation and as special agent with the Counter-Intelligence Corps of the United States Army. From his experience, this writer knows that the law enforcement officers did in this case what has been generally accepted in law enforcement circles as legally permissible for a great many years. However, the United States Supreme Court has ruled that certain procedures of state law enforcement officers concerning search and seizure violated the constitutional

rights of the accused, and have prohibited the use of evidence produced as a result of such illegal search and seizure; therefore, existing law enforcement procedures in the investigation of crime and the detection of the perpetrators of crime must be examined in the light of these decisions.

It has been generally accepted by law enforcement officers that when a crime has been committed, law enforcement officers have the right and duty to conduct an investigation at the scene of the crime without the necessity of a search warrant, and that this investigation includes a reasonable search of the vicinity of the scene of the crime and the seizure of any evidence that would establish the nature of the crime and the identity of the person who committed the crime.

When a lawful arrest is made at the scene of the crime, it is clear that the law enforcement officers have the right to conduct a search at the scene of the crime and to seize incriminating articles connected with the crime without a search warrant. 47 American Jurisprudence 515, Searches and Seizures, Section 19.

However, when the person who committed the crime has left the scene of the crime when the law enforcement officials have arrived, does the law require a search warrant for the law enforcement officials to investigate the scene of the crime in order for such law enforcement

officers to seize any incriminating article connected with the crime that is within the reasonable vicinity of the scene of the crime?

It would seem that this issue would have been decided by many courts, but this writer has not been able to find any decided case directly in point.

I would hold that when a law enforcement officer has reasonable cause to believe that a felony has been committed, he has the right and duty to investigate the scene of the crime without the necessity of a search warrant; that this investigation includes a reasonable search of the vicinity of the scene of the crime and the seizure of any incriminating articles connected with the crime, and that such a search and seizure does not violate the provisions of the Fourth Amendment of the United States Constitution and Section 14 of Article I of the Ohio Constitution.

The guaranty set out in the various constitutional provisions against search and seizure is designed to prevent violations of private security of person and property and unlawful invasions of the sanctity of the home of the citizens by officers of the law. 47 American Jurisprudence 507, Searches and Seizures, Section 10.

However, when a crime has been committed, a public law has been violated, and there is a public interest in the investigation of the crime and the determination of the identity of the person who perpetrated the crime.

One of the first steps in the investigation of a crime is an examination of the scene of the crime. The writer is unaware of any law enforcement agency that obtains a search warrant as a routine procedure to investigate the scene of a crime. Investigations by law enforcement officers at the scene of a crime without a search warrant have occurred innumerable times in the past and are continuing at the present time. Apparently, this procedure has been generally accepted, because this writer has found no decided case that challenges the search and seizure of evidence in the vicinity of the scene of the crime as an unreasonable search and seizure within the prohibitions of the various constitutional provisions.

It is submitted that the guaranty set out in the constitutional provisions against search and seizure is to protect the general public against invasion of privacy by law enforcement officers, and that these constitutional provisions were never intended to protect those who violate the laws from being prosecuted. The constitutional standard of a search and seizure is "unreasonableness". I would hold that when a crime is committed, the search of the vicinity of the scene of the crime by a law enforcement officer without a warrant is reasonable. It is submitted that to require a search warrant for every such search would not only be unreasonable but an unrealistic and unnecessary burden on effective law enforcement.

In the instant case, there is no issue as to the investigation by the law enforcement officers at the scene of the crime. The problem arises, because the law enforcement officers had reasonable cause to believe that defendant's automobile was used to transport the victim to the scene of the crime, and that the chain of events that directly led to the murder of the victim commenced within defendant's automobile.

If defendant's automobile was left parked at the scene of the crime, defendant would have difficulty to question the right of law enforcement officers to search and to seize it. If this was the situation, I would hold that the law enforcement officers would have the legal right to search and to seize defendant's automobile without a search warrant.

However, defendant had moved his automobile from the scene of the crime. Does this fact create any additional constitutional restriction to its search and seizure?

In this case, the trial court upheld the seizure and search of defendant's automobile without a search warrant as a seizure of "an instrumentality used in the commission of the crime", and the majority opinion concurs with this reasoning. I also concur with this reasoning, but feel that more explanation should be given. The rationale followed by the trial court is supported in the recent case

of Trotter and Harris v. Stephens, 241 F. Supp. 33 (1965), which was decided by a United States District Court in Arkansas, and whose eleventh headnote is as follows:-

> "Search of an automobile, which proved to be vehicle in which rape occurred, without search warrant approximately two hours after lawful arrest was not violative of any federal right, and fruits of search including property of victim were not unlawfully obtained."

The above case was affirmed by the Eighth Circuit United States Court of Appeals in a reported decision entitled Harris v. Stephens, 361 Federal (2d) 888 (1966).

In Hemmis v. State of Wisconsin, 24 Wis. (2d) 346, 129 N. W. (2d) 209, the Supreme Court of Wisconsin held that search of automobile without search warrant was justified under exceptional circumstances including showing that officers had probable cause to believe that automobile was used by one or more persons involved in burglary, and that automobile could be and subsequently was used to effect a flight from scene by one of the participants.

The constitutional restrictions on searching an automobile are an extension of those restricting the search of a private dwelling; however, there is an important difference. A dwelling is static and is not readily moved, but an automobile is by its nature mobile.

I would hold that the same reasons of public policy that I believe permit the search of a dwelling house when a crime has been committed on its premises without

a search warrant would also permit the search and seizure of a motor vehicle without a search warrant when the law enforcement officers have reasonable cause to believe either that a felony has been committed within the motor vehicle or that the motor vehicle was used in the commission of a felony.

I would further hold that the fact that a motor vehicle is moved from the scene of the crime should not affect any constitutional restrictions as to its search and seizure.

In the instant case, no matter where defendant's automobile was driven after it left the scene of the crime, it does not change the fact that the law enforcement officers had reasonable cause to believe that this automobile was used to drive the victim to the scene of the crime, and that the chain of events that led directly to the murder of the victim commenced within this automobile.

I would hold that defendant's automobile was an integral part of the scene of the crime when the crime was committed, and that the fact that defendant detached this automobile as a part of the scene of the crime by driving it from the scene of the crime does not change its character as a part of the scene of the crime, and does not change the effect of the constitutional provisions against an unreasonable search and seizure of this automobile.

In the instant case, defendant was arrested on a

Sunday afternoon in Ashtabula by a deputy sheriff, and had to be transported to Jefferson, the county seat. Defendant did not have his automobile with him, and the automobile remained in Ashtabula. Within a reasonable time after defendant was incarcerated in the Ashtabula County jail, the sheriff ordered the seizure of defendant's automobile.

Defendant contends that a search warrant should have been obtained and probably could show that a search warrant could have been obtained by contacting all the available judges in Ashtabula County at their homes.

Defendant, therefore, contends that the failure of the law enforcement officers to obtain a search warrant made the seizure and search of defendant's automobile "unreasonable" and was a violation of defendant's constitutional rights. As authority for his position, defendant cites the cases of Preston v. United States, 376 U. S. 364, 11 L. Ed. (2d) 777, 84 S. Ct. 881, and State v. Bernius, 177 Ohio St. 155. However, examination of these cases will show that none of them concerned the seizure of an automobile that the law enforcement officer had reasonable cause to believe was used in a specific felony.

Under the circumstances of this case, I concur that the seizure and search of defendant's automobile was reasonable and did not violate defendant's constitutional rights guaranteed under either the Fourth Amendment of the United States Constitution or under Section 14 of Article I

of the Ohio Constitution. I feel that this is true either under the rationale of "an instrumentality used in the commission of the crime", the "exceptional circumstances" enunciated in the case of Hemmis v. State, or the "scene of crime" investigation by law enforcement officers that I have advanced in this opinion.

Johnson, J., Concurs.

APPROVED:

JUDGE.

CONSTITUTION OF THE UNITED STATES:

AMENDMENT IV - SEARCHES AND SEIZURES. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT VI - RIGHTS OF ACCUSED. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

AMENDMENT XIV - RIGHTS OF CITIZENS. Section 1.—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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OHIO REVISED CODE, Section 2901.01. Murder in the first degree. (GC Sections 12400, 12399).

No person shall purposely, and either of deliberate and premeditated malice, or by means of poison, or in perpetrating or attempting to perpetrate rape, arson, robbery, or burglary, kill another.

Whoever violates this section is guilty of murder in the first degree and shall be punished by death unless the jury trying the accused recommends mercy, in which case the punishment shall be imprisonment for life.

Murder in the first degree is a capital crime under Sections 9 and 10 of Article 1, Ohio Constitution.

OHIO REVISED CODE, Section 2941.30. Amending an indictment. (GC Section 13437-29).

The court may at any time before, during, or after a trial amend the indictment, information, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged. If any amendment is made to the substance of the indictment or information or to cure a variance between the indictment or information and the proof, the accused is entitled to a discharge of the jury on his motion, if a jury has been impaneled, and to a reasonable continuance of the cause, unless it clearly appears from the whole proceedings that he has not been misled or prejudiced by the defect or variance in respect to which the amendment is made, or that his rights will be fully protected by proceeding with the trial, or by a postponement thereof to a later day with the same or another jury. In case a jury is discharged from further consideration of a

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case under this section, the accused was not in jeopardy. No action of the court in refusing a continuance or postponement under this section is reviewable except after motion to and refusal by the trial court to grant a new trial therefor, and no appeal based upon such action of the court shall be sustained, nor reversal had, unless from consideration of the whole proceedings, the reviewing court finds that the accused was prejudiced in his defense or that a failure of justice resulted.

OHIO REVISED CODE, Section 2945.10. Order of proceedings of trial (GC Section 13442-8).

The trial of an issue upon an indictment or information shall proceed before the trial court or jury as follows:

(A) Counsel for the state must first state the case for the prosecution, and may briefly state the evidence by which he expects to sustain it.

(B) The defendant or his counsel must then state his defense, and may briefly state the evidence which he expects to offer in support of it.

(C) The state must first produce its evidence and the defendant shall then produce his evidence.

(D) The state will then be confined to rebutting evidence, but the court, for good reason, in furtherance of justice, may permit evidence to be offered by either side out of its order.

(E) When the evidence is concluded, either party may request instructions to the jury on the points of law, which instructions shall be reduced to writing if either party requests it.

(F) When the evidence is concluded, unless the case is submitted without argument, the counsel for the state shall commence, the defendant or his counsel follow, and the counsel for the state conclude the argument to the jury.

(G) The court, after the argument is concluded and before proceeding with other business, shall forthwith charge the jury. Such charge shall be reduced to writing by the court if either party requests it before the argument to the jury is commenced. Such charge, or other charge or instruction provided for in this section, when so written and given, shall not be orally

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qualified, modified, or explained to the jury by the court. Written charges and instructions shall be taken by the jury in their retirement and returned with their verdict into court and remain on file with the papers of the case.

The court may deviate from the order of proceedings listed in this section.

OHIO REVISED CODE, Section 2933.23. Affidavit for search warrant. (GC Section 13430-3)

A warrant for search shall not be issued until there is filed with the judge or magistrate an affidavit particularly describing the house or place to be searched, the person to be seized, the things to be searched for and seized, and alleging substantially the offense in relation thereto, and that the complainant believes and has good cause to believe that such things are there concealed, and he shall state the facts upon which such belief is based. The judge or magistrate may demand other and further evidence before issuing such warrant.

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~~TAFT C.J.~~

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS OF ASHTABULA COUNTY

NO. 41163

STATE OF OHIO

Plaintiff-Appellee

vs.

ROBERT LeROY PRUETT

Defendant-Appellant

MEMORANDUM OPPOSING JURISDICTION

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FILED
NOV 29 1967
SUPREME COURT OF OHIO
THOMAS J. MORGAN, Clerk

TABLE OF CONTENTS

Statement of Facts---------- 1

Questions of Law Presented---------- 11

Reasons Why Case Does Not Contain Issues of Law of Public or Great General Interest and Substantial Constitutional Questions---------- 13

(1) The validity of seizure and search of defendant's motor vehicle should be determined by the totality of the circumstances surrounding the facts of the case itself. A search and seizure made substantially contemporaneously with the time and place of arrest is not in violation of the 4th Amendment of the United States Constitution which provides unreasonable searches and seizures---------- 13

(2) Where the investigation in a criminal case involves a general inquiry into an unsolved crime and has not begun to focus on a particular suspect, any statement obtained from a person being questioned may be used against him at a criminal trial, as said interrogation and said resulting statement does not constitute a violation of the 6th Amendment to the Federal Constitution, and therefore such admission of said evidence constitutes no reversible error---------- 20

(3) Mere indication by prospective juror during voir dire, that he had discussed the case pro and con prior to trial, does not deprive defendant of a fair and impartial trial---------- 25

(4) An indictment for murder may be amended, under authority of Section 2941.30 Revised Code by insertion of the words "or attempting to perpetrate a rape" immediately following the words "in the perpetration of a rape"; such amendment not being a change in the name or identity of the crime charged and not prejudicing the accused in his defense---------- 29

(5) Where, in the trial of a criminal case, evidence is introduced in rebuttal by the State to meet a claim or theory of the defense, the fact that such evidence also tends to prove some element or elements of the State's case in chief does not make such testimony inadmissible, nor is the State deprived of the benefit thereof as tending to prove the commission of the offense alleged in the in-

dictment. The admission of evidence out of some abuse of such discretion appears, when taken in connection with all the evidence in the case, such as to show that a party was prevented from having a fair trial, a verdict will not be disturbed on that ground. See Holt v. The State of Ohio, 107 O.S. 307---------- 32

CONCLUSION---------- 55

APPENDIX A.----------A-1

TABLE OF AUTHORITIES

CASES

Stoner v. California, 376 U.S. 483, 11 L ed 2d 856---------- 14
Preston v. U.S., 376 U.S. 364, 11 L ed 777---------- 14
State v. Bernius, 177 O.S. 155---------- 14
Go-Bart Importing Co. v. U.S., 344, 357---------- 14
U.S. v. Rabinowitz, 339 U.W. 57, 94 L ed 653---------- 15
People v. Thayer, 408 P. 2d 108 (1965)---------- 15
People v. Carroll, 238 N.Y.S. 2d 640 (1963)---------- 15
United States v. Ventresca, 380 U.S. 102 13 L ed 2d 684------ 15
Carroll v. U.S., 69 L ed 543, 553---------- 15
Warden, Maryland Penitentiary v. Bennie Joe Hayden, 18 L ed 2d 782---------- 16
State ex rel. Sadler v. District Court, 70 Mont. 378, 225 P. 1000---------- 20
State v. Milam, 108 Ohio App. 254, 268---------- 21
Henry v. U.S., 4 L ed 2d 136---------- 21
Escabedo v. Illinois, 378 U.S. 478 (1964)---------- 22
Mallory v. U.S., 354 U.S. 449---------- 22
Alexander v. Green, 2 O.S. (2d) 231, 31 O.O. (2d) 231-------- 24
People v. Dorado, 394 P. (2d) 952, 40 Cal. Rptr. 264--------- 24
Farrer v. State, 2 O.S. 54---------- 26
Kent v. State, 42 O.S. 426---------- 26
Schwindt v. Graeff, 109 O.S. 404---------- 26
Wicker v. Cleveland, 150 O.S. 434---------- 26
State v. Miles, 59 NE 2d 39---------- 26
State v. Ferguson, 182 SW 2d 38---------- 27
Huddleston v. State, 64 Southern 2d 90 (ala.)---------- 27
Gossett V. State, 48 SE 2d 71 (Ga.)---------- 27
State v. Finnell, 280 SW 2d 110 (Mo.)---------- 27
Lindsey v. State, 25 SW 2d 533 (Tenn.)---------- 27
People v. Evans, 246 Pac. 2d 636 (Cal.)---------- 27
State v. Oliver, 192 Southern 725 (La.)---------- 27
State v. Ingersoll, 292 Pac. 250 (Mont.)---------- 27
Locicero v. State, 14 Abs. 109---------- 27
Bryant v. State of Ohio, 48 App. 208, Hamilton County, 1933--- 29
State v. Holt, 59 O. App. 309-Court of Appeal for Franklin County, (1938)---------- 30
Holt v. State of Ohio, 107 O.S. 307----------32, 33
Itskin v. State, 51 App. 211 (1953)---------- 32
State v. Lett, 106 App. 285 (1958)---------- 32

CONSTITUTION

Constitution of the United States:
Fourth Amendment----------13, 16
Sixth Amendment---------- 20

STATUTES

Ohio Revised Code:
Section 2941.30----------11, 29, 30

STATEMENT OF FACTS

This case is before the Court on an appeal on questions of law taken by the defendant-appellant from a verdict of a jury of guilty of first degree murder without a recommendation of mercy and the Trial Court's refusal to grant a new trial. The defendant-appellant will hereinafter be referred to as defendant, and the plaintiff-appellee will hereinafter be referred to as plaintiff. All references to the record are to Volume 2 unless otherwise noted.

The defendant was charged by the grand jury of Ashtabula County at its September, 1964 term with murder in the first degree for the killing of Susan Osborne, while in the perpetration of a rape or attempting to perpetrate a rape on or about September 15, 1964. As is stated in the defendant's brief herein the words "or attempt to perpetrate a rape" were added to the indictment by interlineation by order of the Court (R. 590-591).

On September 19, 1964, the body of a dead girl, later to be identified as the victim, Susan Osborne, was discovered by a young boy and his father in a wooded area South of Lake Road near Lake Erie in Ashtabula County. The body was near a lane which traveled South from Lake Road to a dead end. The body was approximately 100 feet from Lake Road and approximately 15 feet from the lane, and because of the vegetation overgrowth, it could not be seen from the lane or from Lake Road.

Upon the discovery of the body of the victim the police were summoned, the area was roped off, the Coroner was summoned, and photographs were taken. In all of the preliminary testimony

regarding the finding of the body, all witnesses stated that the body was not touched or moved in any way until after the photographs had been taken. The photographs which were admitted into evidence show the difficulty in observing the body from the lane, the condition of the terrain in which the body was found, the position of the body when found, the condition of the body when found, the clothing found near the body, and the condition of the various injured and identifying parts of the body. These photographs showed that the body was nude, lying upon its back, that the legs of the victim were spread, and that the body contained a puncture wound in the upper chest and severe damage to the face. Maggots had contaminated the open cavities of the body.

The body was examined on the scene by the Coroner, Dr. John Higerd. He found the body to be in the condition as above described and found a bruise over the left hip, a bruise over the right hip, and streaks of blood running from the wound in the chest over the upper portion of the chest and the right shoulder. (R.102, 112). Among the clothing found near the body was a blouse and a brassiere. The blouse had a small cut in it which corresponded with the wound in the chest of the victim. Both the blouse and the brassiere were encrusted with blood. (R. 123, 125). Death was caused by lack of oxygen due to the damage to the face and throat and the clotting of blood. (R. 146). The victim lived at least 45 minutes after the injuries were inflicted. (R. 149). The victim died at Whitman's Creek, North Kingsville in Ashtabula County, Ohio where the body was found (R. 149) between 4 and 5 days prior thereto. (R. 149).

At the County Morgue in Ashtabula an autopsy was performed on the body of the victim by Dr. Jason Dixon on the evening of September 19, 1964, commencing at about 9:45 P.M. (R. 198). Dr. Dixon is a pathologist at the hospital and had performed at that time approximately 1600 autopsies. (R. 197). Dr. Dixon found in the vagina of the victim a substance which contained an extremely high acid phosphatase content. (R. 208). Dr. Dixon testified that semen has one of the highest concentrations of acid phosphatase and that there was no way that acid phosphatase would be found in the vaginal tract other than by artificial insemination or normal sexual intercourse. (R. 208, 209). The doctor testified that the victim had had intercourse within 12 hours of the time of death. (R. 210). The doctor testified that he found no spermatozoa and that the absence of spermatozoa could not exclude sexual intercourse. (R. 206). Dr. Dixon testified that in his opinion the decedent had died approximately 4 days prior to the autopsy. (R. 211).

The victim's mother, Mrs. Rantamaki, testified that the victim had completed her menstrual period on Monday, September 14, 1964 (R. 176). Normal menstruation would have eliminated any evidence of intercourse had prior thereto. The blood encrusted upon the blouse of the decedent at the hole in the blouse which corresponded with the wound in her chest, was found upon an examination at the FBI Laboratory in Washington (R. 558) to be type B, the same as that of the decedent. The blood on the brassiere of the decedent was found to be human blood but it could not be typed. (R. 565).

The defendant was 26 years old at the time he committed this offense. He had married his 17 year old wife in Las Vegas a few months before coming to Ashtabula County to live with his mother-in-law in Conneaut. He and his wife were working in Las Vegas and earning approximately $180.00 a week. (R. 695). They arrived in Conneaut with no employment arrangements. Theylived with the mother-in-law and paid no room or board, other than work performed around the premises. The defendant testified that he had been in jail in Oregon for violating probation and that he had served in the Armed Forces during which time he had 3 court-martials and admitted to being AWOL on numerous occasions. (R. 736).

The defendant purchased a 1953 Ford a few weeks prior to September 15, 1964. At the time of purchasing the automobile, he was employed at Manpower Training School in Ashtabula, Ohio. His wife was employed as a baby sitter at the time of the death of the victim in Ashtabula, Ohio. On Thursday, September 10, 1964, the defendant and his wife met the victim and a girl friend of the victim, Ann Kent, who was then known as Ann Shaokel, her maiden name, at or near a tavern in Conneaut. (R. 227). The defendant and his wife, the victim and Ann Kent and two other men purchased some beer and went to a beach near Conneaut where the beer was consumed. At or near midnight on that night the party, with the exception of one of the men, returned to a bar in Conneaut at which the decedent danced with the defendant on two occasions. (R. 231). Defendant purchased drinks for the victim on that evening.

On the night of Monday, September 14, 1964, the defendant and his wife and a man named Norman Balcomb and the deceased made

the round of several bars in Conneaut. During the evening Mrs. Kent saw the defendant on several occasions. The last time that Mrs. Kent saw the defendant and the victim was at about 11:30 P.M. in downtown Conneaut. At the time the defendant and his wife were seated in the front seat in the defendant's 1953 Ford and Balcomb and the deceased were seated in the back seat. The deceased asked Mrs. Kent to accompany them and she refused. (R. 240).

During the course of the evening of September 14, 1964, the defendant stated to Balcomb that he had "got in her pants" regarding the deceased. (R. 287). On the same evening he also told Stanley Pachkowski that he "made" Susan, the deceased. (R. 359).

Some time around midnight on the night of September 14, 1964, the defendant took his wife home and he and Norman Balcomb and the deceased proceeded from Conneaut to Ashtabula. During the course of the evening and ending at or about midnight the deceased had eaten most of two bags of pretzels (R. 925) at a bar and grille. During that time the defendant had made comments regarding the switching of partners. (R. 293). At the time the comments were made, Balcomb was with the decedent and the defendant was with his wife. During the course of the evening Susan Osborne had consumed several drinks as had the defendant and Norman Balcomb. Norman Balcomb attempted to make advances on the deceased in the car on the way to Ashtabula, but was essentially unsuccessful. The defendant left Norman Balcomb out of his automobile near Balcomb's home in Ashtabula on September 15, 1964 at about 12:15 A.M. The deceased got into the front seat of the defendant's car as they left Balcomb.

The defendant's wife testified that the defendant returned home at approximately 1:30 A.M. and that she had never left the house. The testimony was controverted by the rebutal witness, who testified that the wife left the house at about 3:10 A.M. The defendant's wife stated that the defendant told her at about 1:30 A.M. that the deceased had jumped out of defendant's car near the General Hospital in Ashtabula and had not returned to Conneaut with the defendant. However, on the following day when Mrs. Kent went to the defendant's home she was told by the defendant's wife that she and her husband had left the deceased out of the automobile in Conneaut at about 12:00 the night before. (R. 241). The defendant's wife also admitted that she told the police the same story about letting the deceased out in Conneaut. (R. 685). On the same evening of September 15, 1964, the evening of the morning following the murder, defendant and his wife went to the home of Norman Balcomb where they told Balcomb, out of the hearing of other persons present, that Susan was missing, and that if Balcomb was questioned by the police about her being missing, he should tell the police that Mrs. Pruett had come to Ashtabula with Balcomb and Mr. Pruett and that they had left Susan in Conneaut. (R. 307). The defendant had been visibly upset at work at Manpower Institute as testified to by several witnesses on the working day of September 15, 1964, and he had left work from about 10:00 A.M. to 2:00 P.M. on that day.

On September 15, 1964, following the death of the deceased, the defendant had a small cut, not a half inch in length, on the knuckle of his right hand. (R. 405). The following day,

September 15, 1964, the defendant told a working companion, George Temple, that in taking the deceased girl from Conneaut to Ashtabula, his wife had accompanied him. (R. 406).

On Saturday, September 19, 1964, the day that the body of the victim was found, the Pruetts stayed the night in Ashtabula with the Balcombs. The following day the Pruetts moved from Conneaut to an apartment that they had rented in Ashtabula. They moved their belongings in boxes in the 1953 Ford.

Upon determining that Norman Balcomb had been with the deceased on the last evening that she was seen, the police interviewed Balcomb and he advised them that the defendant had been with the deceased after he had left the defendant's vehicle. The officers went to the home in Ashtabula where the Pruetts had moved and asked the defendant to come to the station to talk to them. (R. 444). Defendant voluntarily went with the officers to be questioned. He told his wife that he would return in about two hours after being questiond. (R. 690). The defendant was questioned by Detective Harold Roach at the Ashtabula Police Station. Detective Roach's testimony on the subject commencing at (R. 448) is as follows:

"A I explained to Robert at this time of the investigation that we were working on and that it pertained to the death of a 17 year old girl, known as Susan Osborne, from Conneaut. I told him that I knew that he had been in the presence of this girl and of how terrible this crime is and I asked him if he wanted to talk to me about it and wanted to tell me about it and I advised him that he didn't have to say anything to me until he got an attorney. He could call whoever he wanted for help, but I felt sure if he was involved in this it would be best if he tell me about it."

"Q What did he say to that?"

"A Robert Pruett stood there for quite some time with his head bowed and again I asked him if he had been in the area over

there, the Whitman's Creek area on Lake Road and if he wanted to tell me about it. Well, again he stood silent for, oh, maybe a minute and finally he said, 'Yes, I did drive the girl over there.' He said, 'We went east on Lake Road to Whitman's Creek.' And I said, 'What did you do after you got to Whitman's Creek?' He said, 'I parked on the south side of the road. I turned to the right."

"Q I didn't hear that."

"A He said he turned to the right in this parking area off of Lake Road and I said, 'Well, how did you park, Robert?' 'Well,' he said, 'I turned around in this area.' And then I asked him what direction the car would be when he parked. 'Well,' he said, either the lake or Lake Road, the head of the car, the front of the car.' And I asked him how long he was there and he said, 'I don't know."

"Well, what did you do while you were there,' I asked him. He said, 'We talked and I drank a can of beer.' And I asked him what kind of beer this was and he said, 'Genessee.' I asked him if she drank any beer and he said no. After he drank the beer he said he threw the can out of the driver's side of the car and again I asked him what happened then. And he said, ' I made a couple of passes at her and she got out of the passenger side of the car.' Again I asked him what happened."

He said he slid across the seat and got out the same side. I said, 'Go ahead, what happened then?' He said, 'An argument started."

"About this time a police officer from Conneaut came through the hallway to Robert's right and at this time Robert had his head bowed. This was the position in which he was talking to me and evidently he noticed the officer come around the corner and immediately Robert says, 'I didn't do it.' He repeated it twice.

"At this time I told Robert that I was going to have to arrest him and take him to Jefferson."

"Q This was Sunday now, wasn't it?"

"A Yes sir."

"Q What time was this again?"

"A This was shortly before noon."

On the same day, Sunday, September 20, 1964, Detective Roach returned to the scene of the crime and, thoroughly searched the area. (R. 452). In the search of the entire area, they found only one Genessee beer can and that was located next to the driveway about

25 to 30 feet from where the body of the deceased was found. (R. 452, 453).

On the afternoon of September 20, 1964, the Sheriff was advised that the defendant had a 1953 Ford automobile in which he had driven the deceased to the scene of her death and he ordered the car impounded (R. 463, 464), because "it was an instrumentality in the commission of this crime". (R. 464).

This vehicle could not be located at defendant's residence in Ashtabula, Ohio, however, it was later learned that defendant's wife had requested Balcomb to take this 1953 Ford automobile to Balcomb's residence, which was done. Shortly thereafter, Balcomb called the police and requested that the vehicle be removed from his residence. Thereafter, the vehicle was impounded and was in custody until the time of the trial. Upon a search of the vehicle, on the day following the arrest of Pruett, Detective Roach found a spot on the seat cover and on the grille cover of the car radio. (R. 485 to 487). These spots were later analyzed by a chemist for the Federal Bureau of Investigation, who found each spot to be human blood. The blood on the radio grille could not be typed (R. 569), but the blood on the seat cover was typed B, (R. 579), the same as the deceased.

Regarding the eating of pretzels by the deceased and the time for digesting the same, the record disclosed that the decedent consumed two bags of pretzels between 11:35 P.M. and about midnight. (R. 342). The Coroner testified that it would take approximately two hours for the pretzels to be digested (R. 163) or less, if they had been chewed. (R. 169). Dr. Dixon testified that digestion could have taken place within an hour. (R. 219). The

decedent lived at least 45 minutes after she was attacked. (R. 149).

QUESTIONS OF LAW PRESENTED

(1) The validity of seizure and search of defendant's motor vehicle should be determined by the totality of the circumstances surrounding the facts of the case itself. A search and seizure made substantially contemporaneously with the time and place of arrest is not in violation of the 4th Amendment to the United States Constitution which provides unreasonable searches and seizures.

(2) Where the investigation in a criminal case involves a general inquiry into an unsolved crime and has not begun to focus on a particular suspect, any statement obtained from a person being questioned may be used against him at a criminal trial, as said interrogation and said resulting statement does not constitute a violation of the 6th Amendment to the Federal Constitution, and therefore such admission of said evidence constitutes no reversible error.

(3) Mere indication by prospective juror during voir dire, that he had discussed the case pro and con prior to trial, does not deprive defendant of a fair and impartial trial.

(4) An indictment for murder may be amended, under authority of Section 2941.30 Revised Code by insertion of the words "or attempting to perpetrate a rape" immediately following the words "in the perpetration of a rape"; such amendment not being a change in the name or identity of the crime charged and not prejudicing the accused in his defense.

(5) Where, in the trial of a criminal case, evidence is introduced in rebuttal by the State to meet a claim or theory of

the defense, the fact that such evidence also tends to prove some element or elements of the State's case in chief does not make such testimony inadmissible, nor is the State deprived of the benefit thereof as tending to prove the commission of the offense alleged in the indictment. The admission of evidence out of its order rests in the sound discretion of the Court. Unless some abuse of such discretion appears, when taken in connection with all the evidence in the case, such as to show that a party was prevented from having a fair trial, a verdict will not be disturbed upon that ground. See Holt v. The State of Ohio, 107 O.S. 307.

REASONS WHY CASE DOES NOT CONTAIN ISSUES OF LAW OF PUBLIC OR GREAT GENERAL INTEREST AND SUBSTANTIAL CONSTITUTIONAL QUESTIONS.

(1) The validity of seizure and search of defendant's motor vehicle should be determined by the totality of the circumstances surrounding the facts of the case itself. A search and seizure made substantially contemporaneously with the time and place of arrest is not in violation of the 4th Amendment to the United States Constitution which provides unreasonable searches and seizures.

The defendant claims that the search and seizure of defendant's Ford automobile was unlawful in that it was conducted in violation of the 4th Amendment to the Federal Constitution and sets forth verbatim said Amendment.

The Court's attention is directed to the use of the word, unreasonable, in said Amendment and it hereby submitted on behalf of the plaintiff that the search and seizure herein made was not unreasonable as will be more fully explained hereinafter.

In this case the defendant was requested by police officers to go with them to the Ashtabula City Police Department for questioning concerning the death of one Susan Osborne. At this point the police officers were in the investigatory stage of this investigation with no focus of guilt or involvement in the crime being directed towards the defendant. Defendant voluntarily went to the Station House and believed that he would be returning home shortly because he so advised his wife. The actual arrest of the defendant came only after he made a statement to the police officer concerning his involvement. The defendant's automobile had been moved from his residence to another location, however, the police officers seized same at a time substantially contemporaneously with defendant's arrest, which was on a Sunday afternoon, and searched

the automobile on the following day, and as the evidence indicates, said officers found evidence of blood in the automobile matching that of the victim.

The defendant relies heavily on decisions of the United States Supreme Court, Stoner v. California, 376 U.S. 483, 11 L ed 2d 856; Preston v. U.S., 376 U.S. 364, 11 L ed 777 and State v. Bernius, 177 O.S. 155, however, it should be noted that in the Stoner case the problem involving the Supreme Court was one of consent to search being given by a person other than the occupant of a hotel room and in the Preston case an arrest for vagrancy and a subsequent charge of conspiracy to rob a Federally insured bank, and in the Bernius case the problem involved was an arrest for changing lanes in violation of a city ordinance and a subsequent trial on the charge of having unlawfully in his possession or under his control obscene, lewd or lascivious photographs.

It is hereby submitted that none of the factual situations contained therein are applicable to the present case.

It is noted with interest that in the Preston case, pages 366-367, the Court said,

> "....Common sense dictates, of course, that questions involving searches of motorcars or other things readily moved cannot be treated as identical to the questions arrising out of searches of fixed structures like houses. For this reason, what may be an unreasonable search of a house may be reasonable in the case of a motorcar."

The Supreme Court of the United States and the State Courts have historically held that each case is to be decided on its own facts and circumstances. See Go-Bart Importing Company v. United States, 344, 357.

With regard to the "mere evidence rule" as alluded to by defendant in his brief, it should be noted that in United States v. Rabinowitz, 339 U.S. 57, 94 L ed 653, the Court held that there is a right to search incidental to arrest and that such searches turn upon the reasonableness under the circumstances and not upon the practicability of procuring a search warrant, for the warrant is not required. The relevant test is not whether it was reasonable to procure a search warrant, but whether the search was reasonable.

It is unclear as to whether the "mere evidence rule" is a constitutional requirement which is binding on the States. Recently two different states have held the rule inapplicable to the States, while another has limited it to apply only to private papers and books and not to tangible objects such as a pair of shoes. Thus tangible objects could be seized even though they did not fit into the recognized types of seizable items. See People v. Thayer, 408 P. 2d 108 (1965); People v. Carroll, 238 N.Y.S. 2d 640 (1963).

In United States v. Ventresca, 380 U.S. 102 13 L ed 2d 684, the Supreme Court of the United States observed in a footnote in discussing exceptions to search warrants:

> "The exceptions are illustrated by cases in which seizure is impossible except without warrant", Carroll v. United States, 69 L ed 543, 553.... such as a search of a moving object where 'it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality of jurisdiction in which the warrant must be sought."

The most recent pronouncement of the United States Supreme Court on the "mere evidence rule", is contained in Warden,

Maryland Penitentiary v. Bennie Joe Hayden, 18 L ed 2d 782, wherein the Court at page 788 states:

> "The distinction made by some of our cases between seizure of items of evidential value only and seizure of instrumentalities, fruits, or contraband has been criticized by Courts and commentators." The Court of Appeals, however, felt 'obligated to adhere to it'. We, today, reject the distinction as based on premises no longer accepted as rules governing the application of the 4th Amendment."

At page 793 of the Warden case, the Court also states:

> "The rationale most frequently suggested for the rule preventing the seizure of evidence is that 'limitations upon the fruit to be gathered tend to limit the quest itself.' But privacy 'would be just as well served by a restriction on search to the even-numbered days of the month....And it would have the extra advantage of avoiding hair-splitting questions....'. The 'mere evidence' limitations has spawned exceptions so numerous and confusion so great, in fact, that it is questionable whether it affords meaningful protection. But if its rejection does enlarge the area of permissible searches, the intrusions are nevertheless made after fulfilling the probable cause and particularity requirements of the Fourth Amendment and after the intervention of 'a neutral and detached magistrate....' The Fourth Amendment allows intrusions upon privacy under these circumstances, and there is no viable reason to distinguish intrusions to secure 'mere evidence' from intrusions to secure fruits, instrumentalities, or contraband."

The Trial Court below held that the seizure of the vehicle in question was permissible, because the vehicle was the implement or an instrumentality used in the commission of the crime and the Court's final ruling upon the Motion to Suppress beginning at page 151 of Vol. 1 of the record is as follows:

> THE COURT: At the previous hearing on this issue while no issue was made of it, the matter wasn't raised, technically I doubt if there is any showing in the record that there was even a lawful arrest of the defendant at the time we are considering. That issue wasn't raised.

At the previous hearing also, there was a showing as to why the car was taken, and of course, it was shown without question it wasn't taken until after the arrest. Well regardless, I should say without reviewing the reasons in the testimony as shown previously with reference to the taking of the car, the most that can be said, as I recall -- I'm pretty sure I'm right on this -- as to why the car was taken were two points. It was found the car had fictitious license plates and the Sheriff also testified he ordered it picked up following a conversation with his deputies.

Now on the strength of that showing I ruled that the seizure and subsequent search was unlawful. My reason was this: Not because of the no showing of the arrest -- no contention was made for that -- but.....

MR. H. NAZOR: We admit he was arrested at the time.

THE COURT: There is no question about it, there was no question then made, and there can't be any serious question now made that the arrest at that time was lawful; but admittedly the seizure was after the arrest. It was not commensurate in time with the arrest and at that time there was no showing made as to a plausible reason or excuse for taking the car.

The Sheriff has no right to pick up a motor vehicle parked on private premises because he learns that it has fictitious plates on it. Whether he can take it out on a highway is another point. That is not now to be decided.

Well, it now appears that the reason for taking this car, which probably was the reason the Sheriff referred to but didn't elaborate at the prior hearing, was as Detective Roach has testified, namely, that the defendant told him that he had transported the deceased to the particular place where she was found, in this car.

Now admittedly the seizure with the follow-up examination or search of the car was made with knowledge of that information and, of course, made without a warrant authorizing its search and seizure. So as I see it, the issue is where there is a lawful arrest and probable cause to believe that a motor vehicle has been used in connection with the commission of the crime -- not necessarily the instrumentality alone by means of which the death is caused, but the automobile which the officers believe was used in connection with the commission of the crime -- may the automobile be seized without having to commit an unlawful search to get it, for instance breaking into a garage?

There isn't any question but what under the facts of this case the car was actually seized without committing a trespass as far as this defendant is concerned, unless the officers had no right to make the seizure at all.

As I view it now, the issue really is this. Following a valid arrest of this defendant and his having made the statement to the officer that he did, may they lawfully seize this car thereafter and search it?

Well, as I understand the rule, and even in the light of the latest Supreme Court cases dealing generally with this subject, as I read them -- and I think I have read all that counsel have cited and some besides -- I don't think the rule as previously announced has been abridged by those cases, and the rule long has been announced in many, many cases, many, many annotations, as I understand it, the rule is as follows: "That where a lawful arrest is made, a search of the person and of the place where the arrest is made may be had..." That isn't what we are dealing with right now, of course. "And the officers may seize and hold property so found which they reasonably believe is connected with the crime charged, no search warrant is needed to authorize seizure of such articles."

Now the officers did not take the defendant from the car, so it might well be argued that the officers couldn't take the car, pinned closely to only the language of such a rule; but I believe that is backed up by -- and almost without question -- these cases, many of them in these annotations that I have noted where the officers believe that the car is used in connection with and may bear evidence of the commission of the crime for which the lawful arrest is made, they may make the seizure of the property if they do not have to commit an unlawful search to get it. And in this case there was no unlawful search of any premises to get this car, at least nothing unlawful so far as the defendant is concerned.

If we are to say that the officers can't seize the car when they can do so without committing a breach of the peace, if it is to be said that the officers cannot take in order to produce proof of guilt of the defendant under the circumstances here shown, then in my judgment an entirely new rule will have to first be written. I don't read any of the United States Supreme Court cases that way.

There are many of them dealing with this subject in use of evidentiary matter only; however, on examination I find those to be cases dealing not with the seizure of articles by which proof of the crime for which the arrest has been made -- the proof will be had -- but of some other offense. And by and large those cases hold that if the possession of that other evidentiary article is unlawful and hence the article by reason thereof is contraband, even then it may be used. But if it is not, and if the seizure is made as an evidentiary seizure only, in some other case beyond and different than the one for which the arrest is made, such an article thus seized may not be used. That again is not our situation here.

It is my opinion the seizure of this car under the facts shown was justified and the motion to suppress will be overruled.

MR. H. NAZOR: Are you ruling that our motion to

suppress any evidence taken from the car is overruled too?

THE COURT: Yes sir.

MR. H. NAZOR: Very well.

THE COURT: I think that follows as a matter of course. If the right to seize the car exists, the right to examine it follows and the right to use the results of an examination or search -- call it what you will. And the first issue as I see it, did they have a right to seize the car? I think they did. Therefore, I think they had a right after the lawful seizure, certainly, to examin it.

MR. H. NAZOR: Note an exception.

THE COURT: Certainly. That's all.

MR. MAHONEY: Thank you, Judge.

(Thereupon, the hearing was adjourned.)

(2) Where the investigation in a criminal case involves a general inquiry into an unsolved crime and has not begun to focus on a particular suspect, any statement obtained from a person being questioned may be used against him at a criminal trial, as said interrogation and said resulting statement does not constitute a violation of the 6th Amendment to the Federal Constitution, and therefore such admission of said evidence constitutes no reversible error.

We believe that the defendant must concede that the State is entitled to have the evidence interpreted most favorably to it as the jury verdict was rendered in favor of the State. The testimony of Detective Roach, as it was given, is as follows:

> "I told him that I knew that he had been in the presence of this girl and how terrible this crime is, and I asked him if he wanted to talk to me about it and I advised him that he didn't have to say anything to me until he got an attorney. He could call whoever he wanted for help, but I felt sure if he was involved in this, it would be best if he would tell me about it." (Emphasis added)

Throughout defendant's argument on this point he has contended that he was under arrest at the time his statement was made. The evidence emphatically refutes such contention. There can be no doubt that the defendant expected to be questioned by the police. By his own testimony he had discussed with Norman Balcomb what story would be given to the police when they were questioned. When the police came to the defendant's home to question him, he went voluntarily. This statement is not only supported by the officers involved, but by the testimony of the defendant's wife that he would return in a couple of hours. (R. 690). The officers did not wish to detain the defendant and the defendant did not believe that he was being detained. A succinct and often followed definition of arrest is found in State ex rel. Sadler v. District Court, 70 Mont. 378, 225 P. 1000:

> "To constitute an 'arrest', four requisites are involved: A purpose to take the person into custody of the law, under real or pretended authority and an actual or constructive seizure or detention of his person, so understood by the person arrested."

See also State v. Milam, 108 Ohio App. 254, 268, wherein the above definition was quoted with approval.

The body of the deceased girl had been found the evening before the questioning of the defendant. The defendant's name and address were received from Norman Balcomb who was at that time being questioned at the police station. The purpose of the investigation and the questioning of the defendant was strictly investigative, and at that time had nothing to do with accusation. The statement of Detective Roach to the defendant clearly supports this fact.

After being arrested, while still at the Ashtabula Police Station, the defendant's wife called him. The police permitted the defendant to talk to his wife on the telephone. (R. 690). This act is totally inconsistent with defendant's claim of an inquisition as being held incommunicado.

The well established rule laid down by the United States Supreme Court in Henry v. U.S., 4 L ed 2d, 136, is that:

> "An arrest is made the moment a man's movements are restricted and not when a formal arrest is made."

The defendant here did not believe that his movements were restricted. He told his wife as he left with the officers that he would return in approximately two hours. Detective Roach did not restrict the defendant's movements as he testified that he went to the police station in order to talk to the defendant, and that there was no room available to his knowledge for a discussion, so

they spoke in an open corridor in a locker area at the Ashtabula City Building. The defendant was not under arrest at the time of making the incriminating statements to Detective Roach.

The defendant has cited many familiar and leading cases of the United States Supreme Court and other Courts, which in recent times has had occasion to discuss the fundamental constitutional rights of a prisoner in greater detail than was done in the past. Rather than burden the length of this brief with discussion of each of these cases, we believe it sufficient to examine Escabedo v. Illinois, 378 U.S. 478 (1964) and Mallory v. U.S., 354 U.S. 449. The Escabedo case as cited by the defendant at page 19 of their brief holds "....When its focus is on the accused and its purpose is to elicit a confession", an accused must be permitted to consult with an attorney. In the instant case the accused was advised of his rights to consult with an attorney. He was advised that he could seek any help he desired. Furthermore, he was not an accused. It must be apparent to the Court that at this state, early on a Sunday following the Saturday evening discovering of the body, the police were seeking information, simply investigating the killing. By simple view of the body, they knew that they had a murder.

In the Mallory case, the defendant was arrested on suspicion of rape. The Court said that the arrested person could be booked by the police but thereafter an inquiry, designed to elicit damaging statements to support the arrest, could not be conducted. In the instant case, the defendant, Pruett, was not arrested, nor was an inquiry had to attempt to elicit damaging statements. As

the defendant repeatedly points out, Detective Roach did not even have a witness with him when questioning the defendant, nor was he attempting to write down the statements made by the defendant. Certainly, Detective Roach, who had been a police officer for many years, knew that if he sought damaging statements from a person, to be used against him to prove his guilt, said statements would be more convincing if there were other witnesses present when the statements were made, and if then reduced to writing. The fact that there were no other witnesses, and that he was not taking notes, clearly indicates that he was investigating the matter and was not attempting a Star Chamber proceeding, as is implied by the defense.

There is presently a mild clamour in law enforcement circles regarding the rulings of the Court as to rights of a person under the Bill of Rights. Law enforcement officers sometimes contend that to grant to a party the right of counsel and other constitutional rights presumably curtail their effectiveness. Regardless of the validity of this argument, this Court must be aware that to hold that under the circumstances of the instant case, the actions of Detective Roach violated any constitutional right of this defendant, requires this Court to hold that a police officer may never use a statement made by a person which incriminates that person. In the instant case, there was no confession. The police officer was investigating an apparent murder. He was talking to a person who was reportedly the last person to be with the deceased. He stated he had not arrested this person, and the person, by his comments to his wife, indicated that he did not believe he was being detained. There is no case which holds that the admission against interest made by the person not being detained may

not be admitted in a Court of law.

While we believe it was not necessary under these circumstances, certainly the fact that Detective Roach advised the defendant that he could talk to an attorney or could seek other help completely abrogates any sinister or accusatory motive on the part of this officer and would comply with the constitutional requirements had the defendant been under arrest.

It should be noted that defendant relies heavily on principles of law set forth in Alexander v. Green, 2 O.S. (2d) 231, 31 O.O. (2d) 231 and People v. Dorado, 394 P. (2d) 952, 40 Cal. Rptr. 264, however, a cursory reading of these cases indicate that in the Alexander matter a statement was elicited from the defendant after arrest, and in the Dorado case the investigation had focused on the defendant when the incriminating statement was given by the defendant without the requisite warnings.

It is most apparent that in the instant case, the defendant was neither under arrest nor was the investigation focused on the defendant, moreover, the police were merely conducting a general investigation of a murder.

(3) Mere indication by prospective juror during voir dire, that he had discussed the case pro and con prior to trial, does not deprive defendant of a fair and impartial trial.

The defendant here contends that the defendant was not afforded a fair and impartial jury because of prejudice on the part of a juror. The State agrees that the defendant was entitled to receive a jury consisting of impartial members of the public. Defendant received such a jury. In his motion for a new trial filed below, the defendant contended that one of the jurors was prejudiced in spite of the fact that that juror was interrogated by counsel for the defendant on the voir dire examination, admitted that he had heard comments regarding the case, and denied that he had at that time formed an opinion as to the case. The defendant attempted to show this prejudice on the part of that juror by affidavits and testimony of other members of the jury panel. There was no outside evidence produced whatsoever.

On the basis of this showing, the Court below in essence refused to consider the claim of prejudice complying with that doctrine predicated on public policy that a verdict of a jury cannot be impeached solely by the testimony of its members or of the panel. Thus, contrary to the impression given in the brief of the defendant, the Court below did not rule that the juror charged with prejudice was free of prejudice, but the Court ruled in essence that there was no evidence upon which a hearing into that matter could be had.

The Trial Court's opinion on this matter set forth in its Opinion on a Motion for New Trial, pages 5, 6, 7, 8 and 9 is as follows:

"Under its claim of misconduct of the jury, the defense sought to prove what it claimed amounted to misconduct of the jurors and sought to do so solely through evidence by way of an affidavit of one of the jurors and the oral testimony of another. No evidence aliunde or dehors the proposed testimony of the jurors was offered. The Court ruled such evidence inadmissible. The claim is made that since the acts amounting to claimed misconduct occurred outside the Jury Room, or at least prior to the final submission of the case, that the usual rule of aliunde evidence is not applicable and that the jurors themselves may be called directly to testify concerning such matters and in this way thus impeach their verdict.

Before proceeding further, it should be pointed out that the claimed misconduct, if it were such, deals only with the communications of the jurors among themselves, that is to conversations concerning evidence admitted upon the trial and not in any way touching upon an outside communication or factual matters not in evidence. The rule has long been adhered to in this state that affidavits of jurors stating matters of alleged misconduct are not competent to support an application for a new trial unless evidence aliunde is first offered or unless the Court has acquired knowledge of the Jury's behavior from other sources. 16 OJ 2d 56. True, in most instances where the issue has arisen, efforts have been directed toward uncovering what went on in the Jury Room after final submission or with claimed communications with the jurors by outsiders, as distinguished from what is claimed to have transpired before final submission of the case. Examples of this type of cases in Ohio are Farrer v. State, 2 OS 54; Kent v. State, 42 OS 426; Schwindt v. Graeff, 109 OS 404; Wicker v. Cleveland, 150 OS 434; and State v. Miles, 69 NE 2d 39. The rule is one of deep seated public policy to the effect that testimony or affidavits of jurors themselves will not be received for the purpose of impeaching the verdict, at least until other evidence on the subject is first offered.

Whether the claimed misconduct occurred before or after final submission of the case to the jury, the policy involved would be violated in either event if the jurors alone were allowed to thus impune the verdict. Panel members become jurors immediately upon being sworn. The finality of jeopardy then attaches and the jurors certainly

do not don a different cloak when the case is finally submitted. This Court believes the rule should be the same whether the claim of misconduct occurs before or after final submission of the case. Such seems to be the general rule and the following are just a few of the many cases on the point. State v. Ferguson, 182 SW 2d 38; Huddleston v. State, 64 Southern 2d 90 (Ala.); Gossett v. State, 48 SE 2d 71 (Ga.); State v. Finnell, 280 SW 2d 110 (Mo.); Lindsey v. State, 25 SW 2d 533 (Tenn.); People v. Evans, 246 Pac. 2d 636 (Cal.); State v. Oliver, 192 Southern 725 (La.); and State v. Ingersoll, 292 Pac. 250 (Mont.). Such will likewise be the ruling of this Court. See Locicero v. State, 14 Abs. 109.

Under the rule barring testimony of jurors to impeach their own verdict, it is nevertheless almost universally held that testimony of jurors, however, may be admitted to sustain the verdict and this procedure is resorted to most often when a prima facia showing of misconduct is first made; but in the present case, since the Court has ruled that the affidavit and testimony of the two jurors are inadmissible to impeach this verdict, the State's affidavits of thirteen jurors, seeking to sustain the verdict by showing no misconduct, are irrelevant."

"Next it is argued that the defendant did not have a fair and impartial jury as required by the constitution for the reason that juror Gillespie had a prior fixed opinion that the defendant was guilty and withheld disclosure of such opinion upon inquiry on voir dire. In support of this contention, reference was made to the voir dire examination, and the affidavit and oral testimony of prospective juror Osborne were offered and admitted in evidence. In the opinion of the Court, the contention of the defense is not supported in either respect. In the first place, questions put upon voir dire clearly indicated that the joror had discussed the case pro and con, that opinions on guilt or innocence had been expressed, and indicated he may have expressed such an opinion himself. He did, however, answer unequivocally that he had no opinion as to guilt or innocence as he was then questioned."

"Osborne's affidavit is direct and positive and by its language certainly would tend to indicate a false answer on the part of Gillespie when inquired of on voir dire examination. The Court, however, recognizes, as well he must, that the

affidavit is in the language of defense counsel and not necessarily in the language of the witness. Osborne's oral testimony regarding the same subject, on the other hand, is much less specific, somewhat equivocal, and indicates the possibility that whatever he heard may have been spoken by one of four in a group of prospective jurors, two of whom were excused upon challenge for cause because they held fixed opinions on either guilt or innocence."

"Osborne was positive that some of the conversation he attributed to Gillespie took place on Wednesday, the third day of trial, whereas the minutes of the trial show that both were called into the Jury Box on Tuesday, the second day of trial, and Osborne was then excused because he had a very definite opinion in opposition to capital punishment. Osborne admits that he had no direct conversation with Gillespie but claims the statements attributed to him were remarks that he overheard in a group coversation."

"Gillespie categorically denied any such statements as attributed to him by Osborne and various others of the prospective jurors in company with Osborne and Gillespie in the assigned place for the meeting of the prospective jurors deny hearing any such statements from Gillespie. The Court fails to find under this state of the evidence that prospective juror Gillespie testified falsely upon voir dire and further holds that the defense has not sustained its burden of proof in this regard."

(4) An indictment for murder may be amended, under authority of Section 2941.30 Revised Code by insertion of the words "or attempting to perpetrate a rape" immediately following the words "in the perpetration of a rape"; such amendment not being a change in the name or identity of the crime charged and not prejudicing the accused in his defense.

As to the contention of the defendant that the Court erred in permitting the amendment to the indictment, this Court's attention is directed to the preceeding statements of facts and to page twenty-five (25) of defendant's brief, where the amendment to the indictment is set forth. In essence, the Trial Court permitted the State to amend the indictment by adding the words "or attempting to perpetrate rape" after the words "while in the perpetration of a rape" in the indictment. Defendant claimed below and here claims that the addition of such language constituted the addition of a second charge or a new crime to the indictment. In the case of Bryant v. State of Ohio, 48 App. 208, Hamilton County 1933, appeal dismissed 127 O.S. 593, the Court of Appeals for Hamilton County, considering the statutory authority granted the Trial Court, and found in Section 2941.30 Revised Code, (quoted in part on page 26 of defendant's brief herein), found no error in the Trial Court's allowing the State to amend an indictment, from murder while committing a robbery, to murder while attemting to commit a robbery. The Court said at page 210 of that decision:

> "The first question presented involves the nature of the amendment. Was there any change made in the name or identity of the crime charged? We conclude that there was no such change. The crime charged originally and in the indictment as amended was murder in the first degree. Of this crime the defendant was convicted. Even if such were not our conclusion, it is obvious from a reading of the record that the defendant was not mislead or prejudiced by the variance in respect to which the amendment was made, nor has any failure of justice resulted."

A similar conclusion reached in the case of State v. Holt, 59 O. App. 309, Court of Appeals for Franklin County, (1938).

If the Trial Court had not permitted the amendment and the defendant had been acquitted, there can be no doubt that a trial on a later indictment alleging murder while attempting a rape would constitute double jeopardy.

Section 2941.30 Revised Code, grants a Trial Court authority to permit an amendment to the indictment in form or substance, provided only that there may be thereby made no change in the name or identity of the crime. The defendant was charged with the crime of murder in the first degree and the amendment herein permitted in no way changes that charge.

The second contention of the defendant regarding the amendment to the indictment is that the granting of such amendment was not supported by facts and therefore the Court had no authority under the statutes to permit the amendment. The amendment was one from a killing while perpetrating a rape to a killing while attempting to perpetrate a rape. At the time the amendment was permitted there had been introduced the medical testimony set forth in the statement of facts and the photographs taken of the body of the deceased. The deceased lay in a hardened pool of her own blood. She was on her back and her legs were spread. The body was nude. Her coat was spread under her buttocks. There was a stab wound in her chest from which blood had flowed over her shoulder, clearly indicating that the blood was flowing from the wound as she lay. There was blood on her blouse and a cut in its material indicating that she was stabbed while wearing the blouse. Her face was crushed. Medical testimony concluded that there had been intercourse, but

this conclusion was based upon a finding of acid phosphatase with no spermatozoa. Under this state of the evidence, there can be no doubt that the Court was fully warranted in permitting the amendment to include attempt of rape which simply excluded the need to prove penetration. There is no other conclusion that any reasonable mind could draw from these facts.

Regarding the cases cited by the defendant in support of his contention, the State has never claimed and does not now claim that it was attempting to add vital or material elements of the offense. The matter added to the indictment does not accomplish this end. The citations are, therefore, of no effect in determining the point raised by the defendant.

(5) Where, in the trial of a criminal case, evidence is introduced in rebuttal by the State to meet a claim or theory of the defense, the fact that such evidence also tends to prove some element or elements of the State's case in chief does not make such testimony inadmissible, nor is the State deprived of the benefit thereof as tending to prove the commission of the offense alleged in the indictment. The admission of evidence out of its order rests in the sound discretion of the Court. Unless some abuse of such discretion appears, when taken in connection with all the evidence in the case, such as to show that a party was prevented from having a fair trial, a verdict will not be disturbed upon that ground. See Holt v. The State of Ohio, 107 O.S. 307.

Here, as in the earlier assignments of error, the defendant's argument is predicated upon a misconception of the evidence. The defendant and his wife had testified on behalf of the defense, that the defendant had come home at approximately 1:30 A.M. on September 15, 1964, and that she and the defendant remained home the rest of the evening. Mrs. Rosemary Karr testified in rebuttal that she had seen the defendant's wife leave the home at approximately 3:10 A.M. on the same morning. This testimony was clearly in reply to the testimony given for the defense and as such was proper rebuttal testimony, 52 O.Jur. 2d, 561, Trial, Section 75.

At page 33 of his brief, the defendant cites the case of Itskin v. State, 51 App. 211 (1953), for the proposition that there exists in Ohio the right in the defense to submit surrebuttal in answer to rebuttal. The same contention is made by the defense for the case of State v. Lett, 106 App. 285 (1958). Section 2945.10 Revised Code providing for the order of proceeding in trial, grants no right of surrebuttal, and reads in pertinent part as follows:

> "Trial of an issue upon an indictment or information shall proceed before the Trial Court or jury as follows:.....
>
> (D) The State will then be confined to rebutting evidence, but the Court, for good reason, in furtherance of justice, may permit evidence to be offered by either side out of its order....

> The Court may deviate from the order of proceedings listed in this section."

This specific statutory procedure was following in the instant case and in an effort on the part of the Trial Court to grant wide latitude to the defendant, the Court permitted the defendant and his wife to testify as surrebuttal witnesses.

As stated above, the defendant's claim rests upon the ill-conceived premise that the rebuttal testimony was improper because, at least in the view of the defendant, it had a tendency to prove that he, the defendant, did not return home when he said he did. It is submitted that even if this be so, such evidence is proper rebuttal evidence. In this regard the Court's attention is directed to the third paragraph of the syllabus of the case Holt v. Ohio, 107, O.S. 307, which reads as follows:

> "Where, in the trial of a criminal case, evidence is introduced in rebuttal by the State to meet a claim or theory of the defense, the fact that such evidence also tends to prove some element or elements of the State's case in chief does not make such testimony inadmissible, nor is the State deprived of the benefit thereof as tending to prove the commission of the offense alleged in the indictment. The admission of evidence out of its order rests in the sound discretion of the court. Unless some abuse of such discretion appears, when taken in connection with all the evidence in the case, such as to show that a party was prevented from having a fair trial, a verdict will not be disturbed upon that ground."

The Trial Court, in its Opinion to a Motion for New Trial, page 5, stated with regard to the permission given the defendant and his wife to testify in surrebuttal:

> "The Court permitted the defendant and his wife to testify, as above noted. The Court's reasoning at the time was substantially this, that an explanation as to why the wife left the house at that hour ought to be allowed. Of course, she

> denied rather than explained it. This is not to say, however, that because the Court exercised its discretion in that direction with reference to that possible testimony the Court was required to back up and thereafter allow the introduction of the photographs and other testimony above referred to, or having barred the photographs and other testimony in denial of the witness Karr necessarily meant that the denial should carry through to the wife and the defendant and thereby bar the possible explanation of her leaving the house. It should be kept in mind that the issue of fact was first raised by the defense testimony and not during the State's case in chief.. It does not seem that the point of abuse of discretion is well taken."

The statute grants the State a right to rebut. The defense wanted to bring in witnesses and testimony not to deny, but to cast doubt, photos at angles, witnesses who did not hear anyone go out, and amateur weathermen. If the Court granted that, then could not the State bring in photos from different angles, an expert weatherman, and perhaps someone who heard a door close? The trial must end and the statute says it ends at rebuttal unless the Court permits otherwise.

There is no abuse of discretion on the part of the Trial Court. This assignment of error is without basis in fact.

CONCLUSION

It is, therefore, respectfully submitted that for the foregoing reasons, this Court should deny Defendant-Appellant's request for review of the within cause.

Respectfully submitted,

Joseph E. Mahoney

JOSEPH E. MAHONEY,
ATTORNEY FOR PLAINTIFF-APPELLEE
ASHTABULA COUNTY, OHIO

I, Joseph E. Mahoney, Prosecuting Attorney of Ashtabula County, Ohio, hereby certify that a copy of the within Memorandum was personally delivered to NAZOR & NAZOR, Attorneys at Law, Gillmore Building, Ashtabula, Ohio, on the 27th day of November, 1967.

Joseph E. Mahoney

JOSEPH E. MAHONEY,
ATTORNEY FOR PLAINTIFF-APPELLEE
ASHTABULA COUNTY, OHIO

APPENDIX A

THE STATE OF OHIO)
)
ASHTABULA COUNTY)

IN THE COURT OF COMMON PLEAS

No. 8385

THE STATE OF OHIO,
Plaintiff,
-vs-
ROBERT LEROY PRUETT,
Defendant,

OPINION
ON
MOTION FOR NEW TRIAL

Attorneys for Plaintiff:
Joseph E. Mahoney, Prosecuting Attorney
Charles M. Diamond and Francis A. Varckette, Asst. Pros. Attys.

Attorneys for Defendant:
Howard M. Nazor and Gordon L. Nazor, Attorneys at Law, Ashtabula, Ohio.

PONTIUS, J.:

As announced by the Court at the outset of the hearing on the Motion for New Trial, only those matters which are set forth in the motion and which were actually urged upon hearing will be considered and passed upon by the Court in ruling upon this Motion for New Trial. All other matters, concerning which a Motion for New Trial is necessary as a predicate for further action, will be deemed to have been waived by the defendant.

The first ground advanced in the argument is ground 7 of the motion wherein it is claimed the Court abused its discretion, by reason of which the defendant was prevented from having a fair trial and that this occurred in two respects; first, with reference to the admissibility of certain photographs offered by the State and second, with respect to the Court's action in limiting defense testimony on so-called surrebuttal.

With reference to the photographs of the nude body of the victim, it is admitted by the defense to have been proper to show at least some of such photographs as bearing directly upon the res gestae of the crime and the circumstances there shown. The argument is made, however, that there was an abuse of discretion by the Court in admitting too many of them, that they were shocking in nature, and served only to inflame the jury.

A total of seventeen of such photographs were properly identified and offered in evidence. Four were rejected by the Court and thirteen admitted. No one of these photographs showed all of the following details but all of them together tended to show the following: the nude body in the underbrush as it appeared when the officers first arrived, the clothing of the victim and its condition and relation to the body, the area immediately surrounding the body, the position of it in detail with reference to position of hands and arms, detail as to injuries of the face and head, the medal worn around the neck of the victim (by which identification was made), a chest wound, the area staked out where the body had been immediately after its removal and showing blood spots on the ground, the condition of the ground where the body had lain with stakes marking its prior position.

Generally speaking, and particularly in criminal cases, photographs are admissible, though they be shocking and ghastly in character, when taken of the murder victim to show the condition of the body, the location of it, the nature of the injuries inflicted, and in sex offenses especially, the scene of the crime as bearing on the voluntary character of the claimed assignation. The authorities on this point are myriad in number. Reference is here

made to 15 OJ 2d 606; Scott on Photographic Evidence, para. 652, 695, 692, 661, and 866; People vs Northcott, 189 Pac. 704 (Cal.); and a vast number of cases cited in the National Reporter System under Criminal Law at para. 438 and 1169. It is my conclusion that if photographs are admissible for any purpose, they are not to be excluded because they are gruesome, revolting or ghastly if they have any legitimate purpose in describing the res gestae of the crime or otherwise. If such were not the rule, the more horrible the offense being investigated, the more difficult would become the matter of proof, because assuredly matters of this character are most difficult to totally describe by word of mouth only from the witness stand. Realizing that I am here passing upon the exercise of my own discretion, nevertheless I fail to see any claim for abuse of discretion on this point.

The defense testimony tended to show that the defendant had returned home at 1:30 A.M. the morning of September 15th. It also raised an inference, at least, that the wife of the defendant did not leave the house until they both left together, approximately 8:45 in the morning. In rebuttal, the State produced an eye witness, a close-by neighbor, who saw the defendant's wife leave the house at 3:10 A.M. The defense then offered in so-called sur-rebuttal photographs, the purpose of which was to prove that the eye witness could not have observed defendant's wife leave, or at least would have great difficulty in doing so, and also offered testimony of two other occupants of the house, who had already testified for the defense, and sought to show through them that defendant's wife in fact had not so left the house. Objection to this proffer was sustained by the Court. The defendant and then

his wife each testified that the wife did not in fact so leave the house. This evidence of the defense was offered in substantially the order above set forth.

It is admitted by the defense that under the provisions of R.C. 2945.10, which prescribes the methods of procedure in criminal cases, there is no express provision for the presentation of surrebuttal evidence. The argument, however, is in short that because the defense had no knowledge of this eye witness, the Court in the exercise of its discretion under R.C. 2945.10 should have allowed this refuting evidence.

Even in states where by procedural statutes the endorsement on the indictment or the otherwise giving notice of the names and addresses of the witnesses to be relied upon by the State are required, still such a statutory rule does not extend to rebuttal witnesses. See numerous cases cited in 23 CJS, pg. 777, para. 948. The reasoning applied in some of these cases is to the effect that that which is rebuttal in nature is no surprise to the defendant. The rule seems to be well settled in Ohio, as well as elsewhere, that when rebuttal testimony is offered only to refute a defensive issue, no occasion arises for the admission of surrebuttal testimony by the defendant and the denial thereof is not an abuse of discretion. See State vs Lett, 106 OA 285; State vs Blanton, 111 OA 111. Attention is also called to the case of People vs Simms, 393 Ill. 238, 69 NE 2d 86, a case which is almost on all fours with the point raised by the defense in Pruett respecting the proffer through Wilbert Dyer, of testimony concerning the setting of the moon. In Simms, rejection of pages from the almanac to prove there was no moon was upheld and the witness in that case was no more

certain on the point than was Mrs. Karr in the Pruett case.

The Court permitted the defendant and his wife to testify, as above noted. The Court's reasoning at the time was substantially this, that an explanation as to why the wife left the house at that hour ought to be allowed. Of course, she denied rather than explained it. This is not to say, however, that because the Court exercised its discretion in that direction with reference to that possible testimony the Court was required to back up and thereafter allow the introduction of the photographs and other testimony above referred to, or having barred the photographs and other testimony in denial of the witness Karr necessarily meant that the denial should carry through to the wife and the defendant and thereby bar the possible explanation of her leaving the house. It should be kept in mind that the issue of fact was first raised by the defense testimony and not during the State's case in chief. It does not seem that the point of abuse of discretion is well taken.

Under its claim of misconduct of the jury, the defense sought to prove what it claimed amounted to misconduct of the jurors and sought to do so solely through evidence by way of an affidavit of one of the jurors and the oral testimony of another. No evidence aliunde or dehors the proposed testimony of the jurors was offered. The Court ruled such evidence inadmissible. The claim is made that since the acts amounting to claimed misconduct occurred outside the Jury Room, or at least prior to the final submission of the case, that the usual rule of aliunde evidence is not applicable and that the jurors themselves may be called directly to testify concerning such matters and in this way thus impeach their verdict.

Before proceeding further, it should be pointed out that the claimed misconduct, if it were such, deals only with the communications of the jurors among themselves, that is to conversations concerning evidence admitted upon the trial and not in any way touching upon an outside communication or factual matter not in evidence. The rule has long been adhered to in this state that affidavits of jurors stating matters of alleged misconduct are not competent to support an application for a new trial unless evidence aliunde if first offered or unless the Court has acquired knowledge of the Jury's behavior from other sources. 16 OJ 2d 56. True, in most instances where the issue has arisen, efforts have been directed toward uncovering what went on in the Jury Room after final submission or with claimed communications with the jurors by outsiders, as distinguished from what is claimed to have transpired before final submission of the case. Examples of this type of cases in Ohio are Farrer vs State, 2 OS 54; Kent vs State, 42 OS 426; Schwindt vs Graeff, 109 OS 404; Wicker vs Cleveland, 150 OS 434; and State vs Miles, 59 NE 2d 39. The rule is one of deep seated public policy to the effect that testimony or affidavits of jurors themselves will not be received for the purpose of impeaching the verdict, at least until other evidence on the subject is first offered.

Whether the claimed misconduct occurred before or after final submission of the case to the jury, the policy involved would be violated in either event if the jurors alone were allowed to thus impune the verdict. Panel members become jurors immediately upon being sworn. The finality of jeopardy then attaches and the jurors certainly do not don a different cloak when the case is

finally submitted. This Court believes the rule should be the same whether the claim of misconduct occurs before or after final submission of the case. Such seems to be the general rule and the following are just a few of the many cases on the point. State vs Ferguson, 182 SW 2d 38; Huddleston vs. State, 64 Southern 2d 90 (Ala.); Gossett vs State, 48 SE 2d 71 (Ga.); State vs Finnell, 280 SW 2d 110 (Mo.); Lindsey vs State, 25 SW 2d 533 (Tenn.); People vs Evans, 246 Pac. 2d 636 (Cal.); State vs Olivèr, 192 Southern 725 (La.); and State vs Ingersoll, 292 Pac. 250 (Mont.). Such will likewise be the ruling of this Court. See Locicero vs State, 14 Abs. 109.

Under the rule barring testimony of jurors to impeach their own verdict, it is nevertheless almost universally held that testimony of jurors, however, may be admitted to sustain the verdict and this procedure is resorted to most often when a prima facia showing of misconduct is first made; but in the present case, since the Court has ruled that the affidavit and testimony of the two jurors are inadmissible to impeach this verdict, the State's affidavits of thirteen jurors, seeking to sustain the verdict by showing no misconduct, are irrelevant. Consequently the defense objection to the admissibility of these affidavits will be sustained.

Next it is argued that the defendant did not have a trial by a fair and impartial jury as required by the constitution for the reason that juror Gillespie had a prior fixed opinion that the defendant was guilty and withheld disclosure of such opinion upon inquiry on voir dire. In support of this contention, reference was made to the voir dire examination, and the affidavit and oral testimony of prospective juror Osborne were offered and admitted

in evidence. In the opinion of the Court, the contention of the defense is not supported in either respect. In the first place, questions put upon voir dire clearly indicated that the juror had discussed the case pro and con, that opinions on guilt or innocence had been expressed, and indicated he may have expressed such an opinion himself. He did, however, answer unequivocally that he had no opinion as to guilt or innocence as he was then questioned.

Osborne's affidavit is direct and positive and by its language certainly would tend to indicate a false answer on the part of Gillespie when inquired of on voir dire examination. The Court, however, recognizes, as well he must, that the affidavit is in the language of defense counsel and not necessarily in the language of the witness. Osborne's oral testimony regarding the same subject, on the other hand, is much less specific, somewhat equivocal, and indicates the possibility that whatever he heard may have been spoken by one of four in a group of prospective jurors, two of whom were excused upon challenge for cause because they held fixed opinions on either guilt or innocence.

Osborne was positive that some of the conversation he attributed to Gillespie took place on Wednesday, the third day of trial, whereas the minutes of the trial show that both were called into the Jury Box on Tuesday, the second day of trial, and Osborne was then excused because he had a very definite opinion in opposition to capital punishment. Osborne admits that he had no direct conversation with Gillespie but claims the statements attributed to him were remarks that he overheard in a group conversation.

Gillespie categorically denied any such statements as attributed to him by Osborne and various others of the prospective

jurors in company with Osborne and Gillespie in the assigned place for the meeting of the prospective jurors deny hearing any such statement from Gillespie. The Court fails to find under this state of the evidence that prospective juror Gillespie testified falsely upon voir dire and further holds that the defense has not sustained its burden of proof in this regard.

Prior to trial the defense filed a motion to supress the evidence and therein demanded the return of the defendant's motor vehicle and any and all items taken therefrom. Upon hearing, the Court overruled this motion. Upon trial, the car itself was introduced as an exhibit and viewed by the jury and a seat cover from it likewise was introduced in evidence as well as expert testimony concerning blood spots found thereon.

Upon hearing on the Motion to Suppress it was developed that on Sunday, September 20th, shortly after noon the defendant was taken to the police station and questioned concerning this homicide. During the questioning, it developed that on the night of September 14th. or in the early morning hours of September 15th. he had been with the victim in his car and at the scene where her body was found. The defendant was then placed under technical arrest and a charge was preferred in court against him that afternoon at about 4:00 P.M. Orders were issued by the Sheriff to seize the car. Between the time that the defendant was picked up at his home for questioning and the time when the officers found the car it had been driven from the driveway of defendant's residence where it was at the time the defendant was taken in custody to the residence of another person who called upon the Sheriff to remove it, although no claim is made that that is the reason for the car

having been taken into custody by the Sheriff. It will be noted, however, that the taking of the car from the premises of this person in no way constituted a trespass upon the close of the defendant.

The main argument of the defense on the Motion to Supress was buttoned on the theory that because the seizure was not commensurate with the arrest of the defendant in point of time and space, a subsequent seizure of it followed by a search of it without a search warrant violated the rights of the defendant guaranteed by the Fourth Amendment of the United States Constitution through the Fourteenth Amendment and also by Section 14 of Article I of the Ohio Constitution. In other words, the question is squarely put under these circumstances whether the seizure of the defendant's car followed by a subsequent search of it violated his constitutional rights. Much reliance is placed by the defense on Preston vs United States, 376 US 364, 11 L. Ed. 2d 777, a late case by the United States Supreme Court decided March 23, 1964. In this case, the defendants were arrested on the street by city police officers for vagrancy and their car in which they were then seated was driven by a police officer to a police garage. Later on the car was searched and articles from it seized and turned over to federal authorities, which resulted in the defendants being tried for conspiracy to rob a federally insured bank. The court held that the search was not incident to the arrest and that the seizure of articles as a result of a search of the car was likewise illegal.

In Stoner vs. Californis, 376 US 483, 11 L. Ed. 2d 856, another case strongly relied on by the defense, search of the defendant's hotel room in California two days before his arrest in

Nevada on a charge of armed Robbery, although the offense had been committed, was not an incident to a lawful arrest and hence the search and resulting seizure of property was illegal.

In these two cases the rule seemed to be laid down that a search can be incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest. In Stoner the court said, "The search was completely unrelated to the arrest both as to time and as to place." In Preston the court observed that the search was not undertaken until the defendant and his companion had been arrested (for vagrancy) and taken in custody to the police station and the car had been towed to a garage. Hence at that point there was no danger that the men arrested could have used any weapons in the car or could have destroyed any evidence of a crime, even assuming that there are articles which can be the fruits or implements of the crime of vagrancy. The court also observed that since the car was already in custody there was no danger of its being moved out of the jurisdiction; and the court went on to say that the search was too remote in time and place to have been made as incidental to the arrest and held therefore that it was illegal.

This Court recognizes the austere authority of the United States Supreme Court to pronounce upon constitutional issues, but that is not to say that all that is pronounced by that court must always in so many words be literally followed. The ruling of the court must be read in the light of the facts and the case it was deciding. In Preston, as the court hinted, a motor vehicle could hardly be said to be an implement by which the offense of vagrancy could be committed, nor was there any reasonable or probable cause

to indicate that the motor vehicle either itself would be or would produce any evidence of such offense. In Stoner a search of the defendant's hotel room was conducted two days before his arrest and in another state. Obviously the search was not incidental to an arrest and no probable cause or necessity for a search without a warrant was shown.

In this Pruett case the officer had reasonable and probable cause to believe that the motor vehicle was an instrumentality used in connection with the crime of murder because of what the defendant himself had told him. Further, there was every reason to believe, therefore, that it might itself be or contain evidence of the crime, as in fact it did. Pruett was not under technical arrest until after he was questioned. In point of time, therefore, the seizure of the vehicle as closely as was possible was commensurate with his arrest. Under these circumstances, this Court holds that the seizure was incidental to the defendant's arrest. No one seriously doubts the right of officers to examine, inspect, and test in various ways any article of evidence after a lawful seizure of it. If an object used in connection with the crime being investigated can be seized without a trespass of which the defendant might rightfully complain, no search warrant is ever necessary. Thus the pistol with which a murder is committed, the engraving plates by which counterfeit money is printed, a motor vehicle which struck the hit skip traffic victim, goods which are the object of a larceny or burglary, may all be seized as evidence of the crime and without search warrant, so long as there is no trespass so far as the defendant is concerned.

Harris vs United States, 331 US 143, 91 L.Ed. 1399; United States vs Rabinowitz, 339 US 56, 94 L.Ed. 653; On Lee vs United States, 343 US 747, 96 L.Ed. 1270; People vs Chaigles, 237 NY 193, 32 ALR 666 (Cardozo); State vs. Hawkins 240 SW 2d 688 (Mo.) at 692, "Constitutional guarantees against unreasonable search and seizure apply where seizure is brought about by unlawful search. Those guarantees are not infringed where the recovery and possession of property theretofore stolen is accomplished without search and where such property lies fully disclosed, open to the eye, and in plain view." Hancock vs Commonwealth, 262 SW 2d 670 (Ky.); Bowles vs Misle, 64 Fed. Supp. 835 (DC Neb.); United States vs Yee Ngee How, 105 Fed. Supp. 517 (DC S.D.); State Theater vs Tri-States Theater Corporation, 11 FRD, 381 (DC Neb.).

The Fourth Amendment to the United States Constitution so far as here applicable provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue...."

Section 14 of Article I of the Bill of Rights of the Ohio Constitution so far as here applicable provides as follows: "The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue...."

Seizure of an implement of crime is not an unreasonable seizure in and of itself under all circumstances. Cases are myriad which hold that only the unreasonable seizure is within the constitutional prohibition. In the opinion of this Court, the seizure of the defendant's motor vehicle was reasonable under the circum-

stances disclosed and certainly the search for it was not unreasonable.

Nowhere is it written that a seizure of evidence of a crime is prohibited except as that seizure may be the result of an unreasonable search. Here there was no unreasonable search for the car any more than if a homicide had been with a .38 and a search of the fields and byways was conducted for it. To complete the example, however, a search of the defendant's house for the .38 would require a search warrant unless the search was incidental to a lawful arrest. In either example, the object of the search is the .38. In either instance, a seizure of it may be made because it is an object of evidence of crime; but in the second example, a search warrant or its equivalent, i.e. a timely accompanying arrest, is necessary not because the defendant is to be protected in hiding or keeping the evidence but because his home shall not be violated by such a trespass.

Complaint is made that the verdict of the jury is not sustained by sufficient evidence and is contrary to law. A brief reference here concerning the evidence in the case is necessary. Without attempting to set forth in any detail the voluminous evidence that was presented, it is deemed sufficient for the purposes of this motion to point out that the following principal evidentiary facts, in the opinion of the Court, are established by credible evidence in the record to the extent that the jury would be justified in so concluding; and, therefore, for the purpose of decision on this motion only, may be said to be conceded to be true in the sense that the jury could have and did so find. The injuries suffered by Susan Osborne, which caused her death, are of such a nature as to conclusively carry the inference that someone purposely killed her. The purpose to kill would almost necessarily have to be concluded from the very nature of the injuries inflicted and in argument this fact seems even to be conceded by defense counsel.

The defendant was the last person known to have been with Susan Osborne prior to her death and this fact may well be drawn from the defendant's own testimony on the witness stand and from the testimony of Detective Roach and Norman Balcomb. The defendant was at the murder scene with Susan Osborne in his car. This fact can well be determined from the testimony of Detective Roach. The defendant and his wife concocted a false story concerning the disappearance of Susan Osborne when they told Ann Shackle and the Conneaut police that "they had let Susan out in Conneaut at Kerner's

Drug Store about midnight before they took Balcomb to Ashtabula," although the defendant and his wife obviously knew that the Conneaut police officers had a missing person report regarding Susan and were inquiring as to her whereabouts.

The defendant did not reveal to the Conneaut police what he later claimed was the true story about the disappearance of the deceased, namely, that she had jumped out of his car at the traffic light at 24th. and Lake Avenue. The defendant apparently started the return trip to Conneaut by way of Lake Avenue and Lake Road, but contended that he eventually returned via Route 20. He contended upon trial that he originally started back by way of Lake Road because he was to some extent under the influence of alcohol and wanted to avoid running into police as much as possible, but the jury might well have concluded that there was another reason, namely, to have sexual relations with the victim, as indicated to some extent from his declarations to Balcomb and Ann Shackle made earlier in the evening respecting a desire to "Switch Partners" (obviously referring to his own wife and the deceased) and that he was "going out with Susan" as claimed to have been related to him by Ann Shackle.

In attempting to determine the legal sufficiency of the evidence, the Court has chosen to break down the problem into two parts, i.e., (1) Is the evidence legally sufficient to warrant the jury finding that the defendant purposely killed Susan Osborne, and (2) If so, is the evidence legally sufficient to warrant the jury finding that he did so either while prepetrating or attempting a rape upon her. It should be kept in mind that a purpose to kill is requisite to either first degree or second degree homicide

and as the case is pleaded in this trial, the second element of first degree murder is that the purposeful killing occurred while the defendant was raping or attempting to rape the decedent. This element obviously is that which takes the place of deliberate and premeditated malice in the ordinary first degree case, which element however, was not pleaded by the prosecution herein.

With reference to the first element then, it appears to the Court that the question may well be put thusly. Where a purposeful homicide is satisfactorily shown, is proof that the defendant was at the scene with the victim at or about the time in question plus his falsification to investigating officers and others relative to his connection with the disappearance of the victim sufficient to warrant a finding that the defendant purposely killed the victim when the false story of the defendant relative thereto is not satisfactorily explained but instead the concoction of it is attributed by the defendant to another?

Before proceeding further with this inquiry, it must be kept in mind that the jury, as presumably it may well have done, decided against the defendant with reference to his having made up this story of the victim's disappearance, which from the standpoint of an analysis of the sufficiency of the evidence is to totally gainsay the defendant's contention that the falsehood was the manufactured product of the other person.

That the above recited facts are circumstantial evidence is not to be denied logically, but raise the question as to whether the jury may infer from them that the defendant purposely killed the victim. Are these facts consistent with his guilt and inconsistent with his innocence?

Suppression, or fabrication, or attempts to fabricate, or to procure false evidence, or to destroy evidence, are said to be always admissible against a defendant on the theory of showing of consciousness of guilt, which is in the nature of an admission on the theory that it is not to be supposed that an innocent person would feel the necessity therefor. This is practically the universal rule and there is almost a total dearth of authority to the contrary. Literally hundreds of cases are reported in the digests on the subject but obviously only a few are referred to in this opinion. See 20 Am. Jr. para. 289; State vs Smith, 194 SW 2d. 905, (MO); State vs Christian, 245 SW 2d. 895, (Mo.).

Evidence of this caliber is said to be cogent evidence of guilt. See Harris vs. U.S., 169 Fed. 2d. 887; Harvey vs U.S. 215 Fed. 2d. 330; State vs Broadhurst, 196 Pac. 2d. 407, (Ore.); State vs Thompson, 24 NW 2d. 10, (S.D.); Commonwealth vs Snell, 75 NE 75, (Mass.).

False statements made by the defendant apparently for the purpose of misleading investigating officers and warding off suspicion are admissible against him and are said to be strong indications of guilt. People vs Rumley, 222 Pac. 2d. 913 (Cal.); People vs. Porter, 223 Pac. 2d. 102 (Cal.); Commonwealth vs Bonomi, 142 NE 2d. 140 (Mass.).

Exculpatory statements made on interrogation with intent to divert suspicion or mislead police when shown to be false are circumstantial evidence of guilty consciousness and have independent probative force. United States vs Anthony, 145 Fed. Supp. 323. It is said that such statements are in the nature of substantive evidence in and of themselves. See State vs Redfern, 98 SE 2d.

322 (N.C.); Commonwealth vs Kiefaber, 179 Atlantic 2d. 262 (Pa.); People vs Jordan, 22 Cal. Reptr. 731; Bennett vs State, 377 Pac. 2d. 634 (Wyo.).

In Ohio, as elsewhere, flight following commission of a crime has long been regarded as evidence of guilt unless satisfactorily explained because it tends to show a consciousness of guilt or a guilty connection with the crime. Ohio stands strongly committed to the "consciousness of guilt" theory as being a circumstance from which guilt may be inferred along with other circumstances and facts, and this Court can see no good reason why the rule promulgated by almost all the cases outside of Ohio dealing with the subject matter of suppression of facts and false statements to throw off suspicion as set forth by the cases outlined above should not be applicable in Ohio, although the cases directly in point in this state are very limited in number. See State vs Viola, 51 Abs. 577; Grillo vs State, 6 OCD 90; State vs Grambo, 82 App. 473; Sinatra vs State, 17 Abs. 481.

In State vs Schaeffer, 96 OS 216, an automobile manslaughter case in which the defendant claimed he did not know he had struck the deceased but was cross examined concerning his failure to report the matter after he learned the deceased had been struck, the following language appears on page 222 of the opinion: " It has always been held admissible to show the conduct of the accused immediately after the time he is charged with having committed an offense for the purpose of showing innocent or guilty conduct as the case may be." In Mefford vs State, 13 App. 105 at pg. 107, the court said: "Attempt to supress evidence indicate a consciousness of guilt and if proved to have been made by defendant are highly

probative of criminality." The same rule was recognized in Richards vs State, 43 App. 212, at pg. 221. The Supreme Court in Cleveland vs. McNea, 158 OS 138, at pg. 142 said as follows: "The destruction and suppression of adverse evidence constitute a prejudicial circumstance of much weight as does also the fabrication of a false defense."

In the case at Bar, the defendant and his wife testified to the giving of the false explanation, but claimed Balcomb was the orginator of the idea and that they told it in order not to put Balcomb in an embarrassing position with his wife. Balcomb, on the other hand, testified that the idea was urged upon him by the defendant and his wife to protect the defendant against possible dismissal from the Manpower Training School.

The jury found against the defendant on this issue and likewise thereby found this evidence to be some proof of the principal fact charged against the defendant. In this, the jury was justified according to all the authorities.

The next issue to be determined is whether or not the evidence is legally sufficient to warrant the finding of the jury that the defendant killed Susan Osborne while committing rape or attempting to commit rape upon her. This, of course, is an essential material fact to be found by the jury and sustained by the proof in order to sustain the verdict of murder in the first degree.

The evidentiary facts heretofore recounted and the proper inferences to be drawn therefrom must be kept in mind. In addition thereto, the following facts and the reasonable inferences which may be drawn therefrom must be taken into consideration. The

completely nude body of Susan Osborne was found flat on the back with the legs spread. A small superficial stab wound in the upper left chest corresponded in position with a small cut in her blouse. A large quantity of blood appeared on both the blouse and her brassiere. Her clothes were not torn and seemingly were placed in a pile near her feet, with the exception of her jacket which was under her buttocks. Blood of the same type as the deceased's was found on the seat cover of the defendant's car. There was no evidence of a struggle on the ground. Detective Roach testified that the defendant told him that at the scene he "made a couple of passes" at the deceased and that she got out of the car and he followed her out the same door. The medical testimony of the state tended to sustain the theory of sexual intercourse.

Acknowledging that this evidence is circumstantial in character, does it point toward and is it consistent with the State's theory of rape or attempt to commit rape?

The elements of the offense of rape or the attempt to commit it, like the element of purposeful killing, may be established by circumstantial evidence in cases of homicide. People vs Lindley, 161 Pac. 2d 227 (Cal.); MacAvoy vs State, 15 NW 2d. 45 (Neb.); Hill vs State, 39 SE 2d.675 (Ga.); State vs Folk, 277 Pac. 2d. 1016 (Ariz.); People vs Reed, 240 Pac. 2d. 590 (Cal.); People vs. Moore, 310 Pac. 2d. 969 (Cal.); People vs Doherty, 193 NE 2d. 37 (Ill.); Lipscomb vs. State, 165 Atlantic 2d. 918 (Md.); People vs Griffin, 32 Cal. Reptr. 24; Black vs State, 222 SW 2d. 816 (Ark.); People vs. Lawrence, 259 Pac. 2d. 439 (Cal.); People vs Harris, 118 NE 2d. 470, 306 N.Y. 345 (128 N.Y. Supp. 2d.).

This is but in recognition of the well established principle that in the absence of statutory enactment to the contrary, whatever may be established by direct evidence in a criminal case also may be established by circumstantial evidence. 20 Am. Jur. 261, para. 273.

Before proceeding further, it is well to keep in mind, in an effort to keep the thinking straight, that the evidence tends strongly to maintain the theory that the beating resulting in the death of the deceased and the rape or attempt to commit rape, if there were either, all occurred at the scene where the deceased's body was found. Whether the beating occurred before, during, or after the rape or attempted rape makes no difference. It was part of the res gestae of the crime and if done pursuant to that felonious intent or even after technical completion of such felony, if that be the fact, it nevertheless would result in murder in the first degree. See Conrad vs State, 75 OS 52; State vs Habig, 106 OS 151; Callahan vs State, 201 NE 2d. 338 (Ind.); Commonwealth vs Almeida, 68 Atlantic 2d. 595 (Pa.); 12 ALR 2d. 183.

Reference next is made to some of the Ohio cases dealing with homicide in the commission of some other felony on the point of the weight and sufficiency of the evidence. In Turner vs State, 21 Abs. 276, it was held that where only a belief in the truth of the defendant's story would justify a verdict other than guilty of first degree homicide, such a verdict was not against the weight of the evidence. Without saying so in so many words practically the same result was reached in Dull vs State, 36 App. 195, a case of homicide during a robbery when the real issue on the weight of the evidence turned on the acceptance or rejection by the jury of

a statement claimed by the officer to have been made by a defendant, but which he denied on the witness stand.

In State vs Rogers, 64 App. 39 (our own court), a case of homicide during perpetration of a robbery, the defendant did not participate in the actual shooting but was behind the wheel of the automobile parked a short distance away from the scene. There was a conflict in the evidence as to whether the conspiracy of the three original defendants (separate trials had been granted) was to rob or simply to steal a case of milk. Obviously in the latter instance, because larceny is not one of the felonies mentioned in the statute, there could be no conviction of murder in the first degree, and the verdict then would be both contrary to the weight of the evidence and contrary to law. The evidence was held sufficient to permit the jury to draw the inference of perpetration of robbery.

In Schneider vs State, 1 OCD 565, the ultimate facts that 1) the defendant killed his mother, and 2) in perpetrating a robbery of her, were upheld on the basis of circumstantial evidence only. Blythe vs State, 2 OCD 636, is another case of similar import. Both of these cases decided by the Hamilton Circuit Court and both affirmed by the Supreme Court point out the right of the jury to reject the story or explanation of the defendant when the surrounding circumstances in any way reasonably seem to justify such rejection.

The following are analysis of and exerpts from some of the cases cited supra on homicide rape convictions. In People vs Lindley, 161 Pac. 2d 227, the victim, a thirteen year old girl, was found beaten but was still alive lying in some bushes. She died

about an hour later. Her clothes were torn, there were vaginal bruises. She had been seen fighting with the defendant. Another prisoner claimed the defendant had admitted grabbing and choking the victim, which fact was denied vehemently by the defendant, but he was shown to have been in the vicinity and to have had the opportunity to attack and leave the victim where she was found. The jury found him guilty of homicide in attempt to commit a rape. From the opinion, page 233 -- "If the evidence establishes conclusively that the murder was so committed then only a verdict of murder in the first degree may properly be rendered and even where the showing is not conclusive, if the record affords substantial support for the conclusion that one of the enumerated felonies was perpetrated or attempted and the killing was committed in such perpetration or attempt, the judgment must be affirmed (cases cited)....After conviction all intendments are in favor of the judgment and a verdict will not be set aside unless the record clearly shows that upon no hypothesis whatsoever is there sufficient substantial evidence to support it. (cases)....Unquestionably the jury reasonably could have drawn from the evidence the inference that the girl was killed in the perpetration or attempted perpetration of rape....the girl's physical condition, the marks on her body coupled with all the other evidence amply support the conclusion that death resulted from injuries sustained either in a rape or attempted rape committed by Lindley..... under such circumstances the absence of independent proof of premeditation or deliberation is immaterial. The jury, once satisfied that a rape was perpetrated or attempted and that Lindley was the assailant, had no alternative but to return a verdict of murder in the first degree."

People vs Reed, 240 Pac. 2d 590, from page 595, "It is not the providence of this court to determine conflicts in the evidence nor to choose between different inferences which reasonably may be drawn from the testimony. The sole question so far as the admissible evidence is concerned relates to its sufficiency to support the verdict. The ultimate fact found by the trial court (jury) was that the defendant was guilty of murder in the first degree. If there is substantial evidence in the record to support that judgment, the determination must be upheld. (cases cited)....Applying this rule to the record in this case and conceding that the prosecution is limited to the theory of murder committed in perpetration of rape, it cannot be said that 'upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below'.....The victim was found dead as a result of violence. There is evidence tending to prove that sexual intercourse had been accomplished. The jury was not required to conjecture that the intercourse had been with consent. A reasonable inference to be drawn from the evidence is that (the victim) offered resistance and was raped.... Considering the entire testimony, it amply supports the implied finding of the jury that Reed killed the victim in the perpetration of rape."

See the following language from People vs Harris, supra, at pg. 473 of the opinion, "it is of course conceivable that after defendant left the girl in the hallway someone else came upon her and strangled her, but that is a possibility merely of the same kind present in many other affirmed criminal cases. The question of law is not whether someone else may possibly have strangled her... it is whether the proof points logically to the defendant's guilt

and excludes to a moral certainty every other reasonable hypothesis, that is, whether the proven facts are consistent with and point to defendant's guilt and are inconsistent with his innocence. (cases cited.).... We see no break here in the chain of evidence which points to the defendant and to no one else, unless we are to demand absolute or metaphysical certainty in which event there never could be a conviction on circumstantial evidence alone. This proof meets the established test, likewise as to whether the killing was done while a rape or attempt to rape was being committed. That there was a rape or attempt is fairly inferrable from this proof: defendant's threat, his tussle with the girl, her torn underclothes, her drunken condition, his statement that she fell to the floor before the intercourse. The Trial Court in his charge authorized the jury to find either rape by force or fear or because of intoxication preventing resistance. We think the proof justified much instruction... There was a tussle, there was resistance, the victim's clothes were torn open, there was intercourse, she was strangled to death."

It is not the separate links in the chain of circumstantial evidence which are looked to separately, to determine the legal sufficiency of the evidence, but rather whether when taken as a whole these links make a case which cannot be reconciled upon the hypothesis of innocence. See State vs Butler, 43 Op. 321. It seems to this Court that the rule with reference to the quantum of evidence of a circumstantial nature which will be held legally sufficient to uphold a conviction is oftimes repeated but seldom carefully enough analyzed. As this Court sees it, the issue is whether or not any one link or any one set of circumstances in the

total chain of evidence relied upon to support the conviction, of itself will support an inference only of innocence rather than of guilt. In such a case the total chain of evidence is legally insufficient. Such an example is State vs Domer, 1 OA 2d 155, Ohio Bar, Feb. 1, 1965, a case cited in argument by the defense.

One of the points passed upon by the Court of Appeals was the sufficiency of the evidence of a circumstantial nature concerning in what manner the deceased met his death. A necessary element in the State's case was to prove that the victim was alive prior to the time the defendant poured gasoline over him and the motor vehicle and set them afire. The expert testimony showed there was no trace of carbon monoxide in the victim's blood. The conclusion of the experts was that this proved that the victim was dead at the time the fire was started. On this point the court in its opinion said, "Certainly when considering the state of the record on the question of whether Riddle was alive when the fire was started, as claimed by the State, with the many other factors developed in the record challenging such conclusion, it cannot be said that the State has shown defendant caused the death of Riddle by incineration beyond a reasonable doubt...."

In making an analysis of the evidence in seeking a correct determination of this difficult problem, it seems to me that the Court should attempt to analyze those facts which the jury were justified in finding from the evidence produced and then to determine from those chief evidentiary facts in the chain of circumstantial evidence whether they as a whole point unerringly to the guilt of the defendant and cannot be reconciled with the theory of his innocence. If that be the analysis, the verdict may stand; if

not, the verdict must fall. (See dissenting opinion of Taft in State vs Sheppard, 165 OS 306.)

From the evidence in this case the jury could have found the following principal evidentiary facts, namely: that the defendant said he was going out with the deceased; that he wanted to have intercourse with her; that he was the last known person with her; that he was at the scene with her where her body was found; that the deceased was murdered at this scene; that sexual intercourse with the deceased had been had at the scene by someone, either forcibly or under threat, or if intercourse were not actually consummated, then at least that there was an attempt at it; that the defendant falsely stated the whereabouts of the deceased as he knew them to be when she was missing and being sought; that the defendant on the stand falsely attributed this deceptive explanation to another person. Do these facts and circumstances taken as a whole support the inference of the defendant's guilt and do they exclude every reasonable hypothesis except that the defendant's guilt?

These facts and circumstances are all consistent with each other, each is independently proved, none is inconsistent with the guilt of the defendant, and all of them when taken together are consistent with the defendant's guilt and point unerringly to the defendant and to no one else.

In contravention of the argument that to permit the drawing of such conclusions or inferences is but piling one inference upon another, in the opinion of the Court it is a question of permissible and logical parallel inferences that may be drawn from otherwise proved evidentiary facts. Such is not a violation of

the inference upon inferencerule. See State vs. Martin, 164 OS 54; McDougall vs Glenn Cartage Company, 169 OS 522.

The jury as the trier of the facts must determine the truth or falsity of an asserted secondary fact from which an inference or primary fact is to be drawn in the chain or cable of circumstantial evidence. It is the duty of the Court to pronounce as a matter of law whether the inference may be drawn. It is the function of the jury to say whether or not it will be drawn. If the inference is a logical and permissible one, the Court shall permit it. Then if the jury concludes the inference, it in turn becomes an evidentiary fact. If the evidentiary facts, whether they be the product of direct evidence or circumstantial evidence or both, convince the jury beyond a reasonable doubt of the defendant's guilt, then barring error or indication of passion or prejudice, the verdict should be upheld. It is not the Court but the jury that must be and by its verdict of guilty say that it is satisfied of the defendant's guilt beyond a reasonable doubt.

From the previously recited evidentiary facts, the Court holds that logical and legally permissible inferences may be drawn that there was either a rape or an attempt to commit rape, that there was an intentional killing during the pursuit of such felonious intent, that the defendant was the person responsible therefor. The jury in this case so inferred or concluded and by its verdict has said it is so satisfied beyond reasonable doubt. Individually each member of the jury so spoke upon poll of the jury in open court. This Court cannot say that the jury ought not to have so found or that it should have returned a verdict of not guilty of murder in the first degree but guilty of murder in the

second degree or of manslaughter, even if the Court were it the trier of the facts might possibly have concluded otherwise. As the Supreme Court of Ohio in the recent case of State v. Antill, 176 OS 61 said, "When from the evidence reasonable minds can reach different conclusions on the issue of whether or not the defendant is guilty beyond a reasonable doubt, the case is one for the determination by the jury."

The Court finds no error prejudicial to the rights of the defendant. The Motion for New Trial will be overruled with exceptions noted.

ROLAND PONTIUS, JUDGE

March 27, 1965.

THE SUPREME COURT OF OHIO

State of Ohio,
Plaintiff-Appellee,

v.

Robert LeRoy Pruett,
Defendant-Appellant.

Case No. 41163

C E R T I F I C A T E

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing is a true and correct copy of the notice of appeal, memorandum of appellant and memorandum of appellee filed in this Court in the above entitled case.

I further certify that the foregoing is a true and correct copy of the transcript of docket and journal entries of this Court in the above entitled case.

I further certify that the foregoing is the original of the Precipe and Notice of Appeal to the Supreme Court of the United States filed in this Court in the above entitled case.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of said Supreme Court of Ohio this 4th day of March, 1968.

Thomas L. Startzman
CLERK, THE SUPREME COURT OF OHIO

John L. Jenkins
Deputy Clerk

Application

for

EXTENSION OF TIME IN WHICH TO FILE

PETITION FOR CERTIORARI

No. 1700 Misc. O. T. 1967

DISPOSITION: DATE:

DATE	MEMORANDUM
3/11/68	Filed
3/12/68	Granted until 4/15/68 by Stewart, J.

OFFICE OF THE CLERK

OCTOBER TERM, 19 ..

CASE NO. ...

ROBERT LEROY PRUETT

v. OHIO

TO: MR. JUSTICE STEWART

Application for an extension of time within which to file a petition for a writ of certiorari.

Time expires: March 19, 1968

Extension Requested: May 17, 1968
(59-day extesnion requested)

Reason: This is a capital case and counsel are court appointed. Counsel were admitted recently to the bar of this Court and were not familiar with the practice and proceedure before this Court.

M. Rodak, Jr.

Supreme Court of the United States

No. ---------- , October Term, 1967

ROBERT LEROY PRUETT,

Petitioner,

vs.

OHIO

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 15, 1968.

Associate Justice of the Supreme Court of the United States

Dated this 12th day of March, 1968.

IN THE

SUPREME COURT OF THE UNITED STATES
TERM 1968

NO.

ROBERT LEROY PRUETT

PETITIONER

-against-

~~UNITED STATES OF AMERICA~~ OHIO

RESPONDENT

APPLICATION FOR EXTENSION OF TIME IN WHICH
TO FILE PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE POTTER STEWART
JUSTICE OF THE UNITED STATES SUPREME COURT
AND CIRCUIT JUSTICE FOR THE SIXTH JUDICIAL CIRCUIT

The petitioner herein respectfully applies for an extension of time within which to file a petition for writ of certiorari to review the judgment of the Court of Appeals for the Seventh Appellate District of the State of Ohio and the Supreme Court of the State of Ohio in the above entitled proceeding. The judgment of the Ohio Supreme Court refusing to hear this cause was entered on December 20, 1967, and the time in which to file such a petition will expire on the 19th day of March, 1968. This application requests that the time be extended from March 19, 1968 to and including the 17th day of May, 1968.

RECEIVED
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SUPREME COURT, U.S.

By its order filed December 20, 1967, the Ohio Supreme Court refused to review the judgment of the Court of Appeals of the Seventh Appellate District of Ohio affirming a judgment of conviction of murder in the first degree of the Court of Common Pleas of Ashtabula County, Ohio, under which the death penalty was imposed. The section of the Ohio Revised Code alleged to have been violated by the petitioner is O.R.C. 2901.01. The jurisdiction of this Court rests on 28 U.S.C.A. 1257 (3). This case involves the conviction of the petitioner under Section 2901.01 of the Ohio Revised Code which reads in part as follows:

> "No person shall purposely, and either of deliberate and premeditated malice, or by means of poison, or in perpetrating or attempting to perpetrate rape, arson, robbery, or burglary, kill another."

The Ohio Statute carries with it the death penalty and the petitioner was convicted without a recommendation of mercy, and sentenced to death. The primary issues involved in this case are as follows:

(1) An illegal seizure and search of petitioner's motor vehicle.

(2) The allowance by the Court of an amendment to the indictment after the trial had commenced by adding a second count alleging a killing while attempting to perpetrate rape. The first count alleged a killing while perpetrating rape and this was the count returned by the Grand Jury. The second count, however, was not returned by the Grand Jury but was simply added to the indictment on motion of the State.

(3) Statement made by the petitioner permitted into evidence without petitioner having been effectively warned of his constitutional rights.

(4) Juror, prior to being sworn as juror and permitted to sit in the case, made a statement to other prospective jurors, that he was of the opinion that the petitioner was guilty, the petitioner thereby being deprived of a fair and impartial trial as afforded by the Constitution of the United States.

(5) Error on the part of the trial Court in admitting evidence of alleged prior offenses committed by petitioner, there being no convictions of the same.

Counsel representing petitioner were only admitted to practice before the United States Supreme Court, to-wit: on the 7th day of March, 1968, and were unfamiliar with practice and procedure before the Court, making additional time necessary for counsel to prepare the petition for writ of certiorari and brief supporting same. The petitioner in this case being indigent, the undersigned counsel were appointed to defend him and have carried the burden of this case for a period of between three and four years.

The request for an extension of time will in no way delay consideration of the case by this Court, it being represented to counsel that should the Court grant the petition for a writ of certiorari, the case could not be heard on its merits before the Fall 1968 Term of this Court.

Attached hereto are copies of the order of the Supreme Court of Ohio dismissing the appeal sua sponte, the mandate of the Supreme Court of the State of Ohio remanding the cause to the Court of Common Pleas of Ashtabula County, Ohio, and the journal entry of the Supreme Court of the State of Ohio staying execution of the death sentence pending the timely filing of an appeal to the Supreme Court of the United States and ordering that if such appeal is timely filed, the stay is to continue for an indefinite period, pending a final determination of the United States Supreme Court.

WHEREFORE, it is respectfully requested that the time in which to file a petition for writ of certiorari be extended to and include the 17th day of May, 1968.

Respectfully submitted,

NAZOR AND NAZOR

Leonard M. Nazor

Gordon L. Nazor

Gillmore Building
Ashtabula, Ohio 44004
ATTORNEYS FOR PETITIONER

March 8, 1968.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of the Application for Extension of Time in Which to File a Petition for Writ of Certiorari on Joseph E. Mahoney, Prosecuting Attorney for Ashtabula County, Ohio, on the 8th day of March, 1968.

Gordon L. Nazor

OF THE FIRM
OF NAZOR AND NAZOR
ATTORNEYS AT LAW
GILLMORE BUILDING
ASHTABULA, OHIO

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

19 67 TERM
To wit: December 20, 1967

The State of Ohio,
Plaintiff-Appellee,

vs.

Robert LeRoy Pruett,
Defendant-Appellant.

No. 41163

APPEAL FROM THE COURT OF APPEALS

for ASHTABULA *County*

This cause, here on appeal as of right from the Court of Appeals for CUYAHOGA *County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.* and it appearing to the Court that the date heretofore fixed for the execution of the judgment and sentence of the Court of Common Pleas is now past, this Court proceeding as required by law does hereby fix the 9th day of February, 1968, as the date for carrying said sentence into execution by the Warden of the Ohio Penitentiary, or in his absence by the Deputy Warden, in accordance with the statutes in such case made and provided.

It is further ordered that a certified copy of this entry and a warrant under the seal of this Court be duly certified to the Warden of the Ohio Penitentiary and the Warden make due return thereof to the Clerk of the Court of Common Pleas of Ashtabula County.

It is further ordered that the appellee recover from the appellant its *costs herein expended; that a mandate be sent to the* COMMON PLEAS COURT *to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for* ASHTABULA *County for entry.*

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this day of 19

Clerk

Deputy

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

19 67 TERM
To wit: December 20, 1967

The State of Ohio,
Plaintiff-Appellee,

vs.

Robert LeRoy Pruett,
Defendant-Appellant.

No. 41163

MANDATE

To the Honorable COMMON PLEAS COURT
Within and for the County of ASHTABULA, *Ohio, Greeting:*

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Appeal dismissed, sua sponte, no substantial constitutional question involved.

It is also ordered that the execution date be set for Friday February 9, 1968.

THOMAS L. STARTZMAN,
Clerk

..... *19*.....

.....

..... *Deputy*

RECORD OF COSTS

Docket Fee . . . . . $ 20.00 *Paid by* Nazor & Nazor
Docket Fee . . . . . $ *Paid by*
Docket Fee . . . . . $ *Paid by*
Printing Record . . . . . $ *Paid by*
Supplemental Record . . $ *Paid by*
Sheriff's Costs . . . . . $ *Paid by*
Sheriff's Costs . . . . . $ *Paid by*

THE STATE OF OHIO,
City of Columbus.

19 68 TERM

To wit: Thursday, January 4, 1968

The State of Ohio,
Plaintiff-Appellee,

vs.

Robert LeRoy Pruett,
Defendant-Appellant.

No. 41163

ENTRY

Upon consideration of the motion, filed by counsel for Appellant, to stay the execution of sentence pending the timely filing of an appeal to The Supreme Court of the United States, it is therefore

ORDERED that the execution of sentence be, and hereby is, stayed pending the timely filing of an appeal to The Supreme Court of the United States, and it is further ordered that if such appeal is timely filed, this stay will continue for an indefinite period pending final determination by The Supreme Court of the United States.

It is further ORDERED that the Clerk of this Court shall forthwith send a certified copy of this entry staying execution to the Warden of the Ohio Penitentiary, who shall acknowledge receipt thereof.

Kingsley Taft
CHIEF JUSTICE

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No.....Page.....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 4th *day of* January, *19* 68

THOMAS L. STARTZMAN *Clerk.*

By Jane L. Jessup *Deputy.*

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 1700 Misc. OCTOBER TERM 1967

ROBERT LEROY PRUETT

PETITIONER

-vs-

STATE OF OHIO

RESPONDENT

RECEIVED
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SUPREME COURT, U.S.

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

TO: THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT

Petitioner, Robert LeRoy Pruett, who is now confined at the Ohio State Penitentiary in Columbus, Ohio, as the result of the jury verdict of the Common Pleas Court of Ashtabula County, Ohio, finding the petitioner guilty of murder in the first degree and sentencing him to death by electrocution on the 18th day of August, 1965, hereby asks leave to file the attached Petition for a Writ of Certiorari without prepayment of costs and to proceed in forma pauperis. The petitioner's affidavit in support of this motion is attached hereto.

NAZOR AND NAZOR

BY Edward M. Nazor

BY London L. Nazor

ATTORNEYS FOR PETITIONER
Gillmore Building
Ashtabula, Ohio 44004
#216-993-2121

STATE OF OHIO)
) SS.
COUNTY OF FRANKLIN)

IN THE SUPREME COURT OF THE UNITED STATES

CASE NO.

ROBERT LEROY PRUETT
PETITIONER

-vs-

UNITED STATES OF AMERICA
RESPONDENT

AFFIDAVIT IN SUPPORT OF PETITION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, ROBERT LEROY PRUETT, being first duly sworn according to law, depose and say that I am the petitioner in the above entitled cause, and, in support of my application for leave to proceed without being required to prepay costs or fees, state:

1. I was convicted of the crime of murder in the first degree in violation of O. R. C. Section 2901.01 by the jury verdict of the Common Pleas Court of Ashtabula County, Ohio, and was sentenced to death by electrocution. I am presently confined in the Ohio State Penitentiary in Columbus, Ohio.

2. Because of my poverty I am unable to pay the costs of said cause.

3. I am unable to give security for the same.

4. I believe that I am entitled to the redress I seek in said cause.

5. During the proceedings had in the courts below, I was represented by the Law Firm of Nazor and Nazor, assigned counsel, without expense to me and I have requested that they continue to so represent me on this petition.

WHEREFORE, it is respectfully prayed that this application for leave to proceed in forma pauperis be granted.

Robert Leroy Pruett
ROBERT LEROY PRUETT

Sworn to before me this 2 day of February, 1968.

Fred Renault
NOTARY PUBLIC

FRED RENAULT
NOTARY PUBLIC, FRANKLIN COUNTY, OHIO
MY COMMISSION EXPIRES 10/16/72

INDEX TO PETITION

OPINIONS BELOW 1

JURISDICTION 1

JOURNAL ENTRY OF THE SUPREME COURT OF OHIO DISMISSING APPEAL SUA SPONTE 33

MANDATE OF THE SUPREME COURT OF OHIO SETTING EXECUTION DATE 34

JOURNAL ENTRY OF THE SUPREME COURT OF OHIO STAYING EXECUTION 35

QUESTIONS PRESENTED 2

STATEMENT OF FACTS 3

REASONS FOR GRANTING THE WRIT

FIRST REASON

THE MOTOR VEHICLE OF THE DEFENDANT WAS ILLEGALLY SEIZED AND SEARCHED, NO SEARCH WARRANT HAVING BEEN OBTAINED 7

SECOND REASON

A STATEMENT AGAINST INTEREST WAS MADE BY THE DEFENDANT WITHOUT THE DEFENDANT'S HAVING BEEN EFFECTIVELY WARNED OF HIS CONSTITUTIONAL RIGHTS AND SAID STATEMENT WAS ADMITTED INTO EVIDENCE 12

THIRD REASON

A JUROR PRIOR TO BEING SWORN MADE A STATEMENT TO OTHER PROSPECTIVE JURORS THAT HE WAS OF THE OPINION THAT THE DEFENDANT WAS GUILTY. THIS JUROR WAS PERMITTED TO SIT IN THE CASE THUS DEPRIVING THE DEFENDANT OF HIS RIGHT TO HAVE A TRIAL BY A FAIR AND IMPARTIAL JURY 15

FOURTH REASON

THE TRIAL COURT PERMITTED THE INDICTMENT TO BE AMENDED DURING THE COURSE OF THE TRIAL TO INCLUDE A SECOND AND SEPARATE OFFENSE OF MURDER IN THE FIRST DEGREE WHILE ATTEMPTING TO COMMIT RAPE. THIS VIOLATES THE DUE PROCESS CLAUSE OF THE CONSTITUTION 18

FIFTH REASON

THE COURT ERRED IN REFUSING TO ADMIT SURREBUTTAL EVIDENCE OF THE DEFENDANT AFTER THE COURT PERMITTED THE STATE TO INTRODUCE REBUTTAL EVIDENCE WHICH IN FACT REBUTTED NO PART OF THE DEFENDANT'S EVIDENCE. THIS VIOLATES THE DUE PROCESS CLAUSE OF THE CONSTITUTION 21

SIXTH REASON

DOES THE MANDATORY IMPOSITION OF THE DEATH PENALTY UPON THE DEFENDANT AS A CONSEQUENCE OF THE STATE'S CONVICTION OF MURDER IN THE FIRST DEGREE WITHOUT A RECOMMENDATION OF MERCY, VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION 26

SEVENTH REASON

A NUMBER OF PROSPECTIVE JURORS WHO WERE EXAMINED AS TO THEIR QUALIFICATIONS WERE EXCUSED FOR THE SOLE REASON THAT THEY WERE OPPOSED TO CAPITAL PUNISHMENT, PREVENTING THE DEFENDANT FROM HAVING A FAIR AND IMPARTIAL TRIAL BY A FAIR AND IMPARTIAL JURY IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION 27

CONCLUSION 27

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 29, 30

APPENDIX . . . . . Separately Printed

IN THE

SUPREME COURT OF THE UNITED STATES
NO. , OCTOBER TERM 1967

ROBERT LEROY PRUETT

PETITIONER

-vs-

STATE OF OHIO

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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Counsel for Petitioner
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Ashtabula, Ohio 44004

HOWARD M. NAZOR
GORDON L. NAZOR
OF COUNSEL

TABLE OF AUTHORITIES

Abel v. U. S., 4 L. Ed. (2d) 668 12
Agnello v. U. S., 70 L. Ed. 145 9
Alexander v. Green, 2 Ohio State (2d) 231 14
Carr v. State, 22 Ohio Appellate 78 18
Dennis v. U. S., 70 S. Ct. 518, 339 U. S. 162 15
Donald v. State, 11 Ohio Circuit Decisions 483 . . . . . 24, 25
Escobedo v. Illinois, 378 U. S. 478 15
Fahy v. Connecticut, 375 U. S. 85 8
Harris v. State, 125 Ohio State 257 20
Itskin v. State, 51 Ohio Appellate 211 24
Ker v. California, 374 U. S. 23 8
Mallory v. U. S., 354 U. S. 449 . . . . . 14, 15
Mapp v. Ohio, 367 U. S. 343 . . . . . 8, 10
Preston v. U. S., 376 U. S. 364 . . . . . 8, 9, 10
State v. Burnius, 177 Ohio State 155 . . . . . 9, 10, 11
State v. Cimpritz, 158 Ohio State 490 20
State v. Lett, 106 Ohio Appellate 285 25
State v. Miles, 41 Ohio Law Abstract 1 25
State v. Presler, 112 Ohio Appellate 437 20
State v. Wozniak, 172 Ohio State 517 . . . . . 20, 21
Stoner v. California, 376 U. S. 364 . . . . . 8, 9
U. S. v. Bayette, 299 Fed. (2d) 92 12
U. S. v. Valentine, C C Tenn., 202 Fed. Supp. 677 7
Vecchio v. State, 8 Ohio Law Abstract 335 26

TEXT.

47 American Jurisprudence, July 1967-July 1968 Supp., p. 74 11

CONSTITUTION.

CONSTITUTION OF THE UNITED STATES:
Fourth Amendment 2, 7, 8, 29
Sixth Amendment 2, 15, 27, 29
Eighth Amendment 3, 26, 29
Fourteenth Amendment 3, 8, 9, 15, 26, 29

STATUTES AND RULES.

OHIO REVISED CODE:
Section 2901.01 . . . . . 3, 19, 26, 30
Section 2933.23 . . . . . 7, 8, 30
Section 2941.30 . . . . . 3, 19, 20, 30
Section 2945.10 . . . . . 21, 22, 24, 25, 31

28 U.S.C.A. 1257 (3) 2, 32

IN THE

SUPREME COURT OF THE UNITED STATES

NO. , OCTOBER TERM 1967

ROBERT LEROY PRUETT

PETITIONER

-vs-

STATE OF OHIO

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

Robert LeRoy Pruett, respectfully prays that a writ of certiorari issue to review the judgment of the Ohio Supreme Court and the Court of Appeals of the Seventh Judicial District of Ohio, affirming the judgment of the Court of Common Pleas of Ashtabula County, Ohio, rendered on the 23rd day of February, 1965, convicting this defendant of murder in the first degree without recommendation of mercy. The finding of the Court of Appeals of the Seventh Judicial District of the State of Ohio is sought to be reviewed because the Supreme Court of Ohio, when an appeal was taken there, dismissed the appeal sua sponte and no opinion was ever rendered by the Ohio Supreme Court.

OPINIONS BELOW

Inasmuch as the opinion of the Court of Common Pleas of Ashtabula County, Ohio, overruling the motion for a new trial, and the opinion of the Court of Appeals of the Seventh District of the State of Ohio affirming the judgment below are voluminous, the same is printed in the Appendix.

No opinion was rendered by the Ohio Supreme Court as the appeal was dismissed sua sponte without a hearing on the merits.

JURISDICTION

The judgment of the Ohio Supreme Court dismissing the appeal sua sponte was rendered on the 20th day of December, 1967, a copy of same appearing on page 33 herein.

An enlargement of time to file this petition was granted by Mr. Justice Stewart on March 12, 1968 and petitioner's time extended to and including April 15, 1968.

The jurisdiction of this Court is invoked under 28 U.S.C.A. 1257 (3).

QUESTIONS PRESENTED

1.

Whether the seizure and search of defendant's motor vehicle without a search warrant and not made contemporaneously with the time and at the same place of the arrest is in violation of the Fourth Amendment to the U. S. Constitution, whether any alleged evidence obtained as a result thereof should be suppressed, and whether admission of said evidence at the trial of the cause constitutes reversible error.

2.

Whether after the eliciting of incriminating statements from the defendant, the investigation having begun to focus upon the defendant in particular as a suspect, and the defendant having been taken into police custody, and the defendant not having been effectively warned of his absolute constitutional rights to remain silent, such statements elicited by police may be used against him at the trial.

3.

Whether a juror should be permitted to sit in the trial of a criminal case when prior to being sworn, he made a statement to other prospective jurors that he was of the opinion the defendant is guilty. In the instant case the juror was permitted to sit thus depriving the defendant of a fair and impartial trial under the Sixth Amendment to the U. S. Constitution.

4.

Whether the amendment, during the course of the trial, of an indictment alleging murder in the first degree while in the commission of rape, adding a second and separate offense of murder in the first degree while attempting to commit rape, is error.

5.

Whether it is error for the trial court to permit rebuttal evidence by

the State when in fact said evidence rebuts no part of the evidence of the defendant, and further after admission of said evidence, whether it is error on the part of the trial court to refuse the defendant the right to surrebuttal, that is to say the right to present evidence refuting the evidence introduced in the State's rebuttal.

6.

Whether the mandatory imposition of the death penalty upon the defendant as a consequence of the State's conviction of murder in the first degree without a recommendation of mercy violates the Eighth and Fourteenth Amendments to the United States Constitution.

7.

Whether the exclusion of several prospective jurors on the sole ground that they are opposed to capital punishment prevents the defendant from having a fair and impartial jury trial.

STATEMENT OF FACTS

The defendant, Robert LeRoy Pruett, was indicted at the September 1964 Term of the Ashtabula County Grand Jury, recalled, for first degree murder for the killing of one Susan Osborne following the commission of rape. This indictment was brought under and by virtue of Section 2901.01 of the Revised Code of Ohio and during the course of the trial a motion was made by the Prosecuting Attorney to amend the indictment to have inserted after the words "in the perpetration of a rape", the words "or attempting to perpetrate a rape", this amendment being permitted under Ohio Revised Code 2941.30 by the Court on February 11, 1965, the trial of the case having commenced on February 1, 1965. (R. Vol. 2, pp. 590-591).

The evidence showed that the defendant, Robert LeRoy Pruett, was a married man who had come to the City of Conneaut, Ohio, to live with his wife in the early summer of 1964; that he was without employment at that time and enrolled in a Manpower Training School in Ashtabula, Ohio, and was attending said school at the time of the alleged commission of the offense.

The evidence indicated that on occasion, the defendant and his wife, frequented beer parlors and a short time prior to the date alleged in the indictment, to-wit: September 15, 1964, had made the acquaintance of the decedent, one Susan Osborne, who was seventeen (17) years of age. The evidence further indicated that the defendant and his wife had been in Susan Osborne's company on at least two (2) occasions prior to September 14, 1964, and that Susan Osborne at said

times had been in the company of various men; that Susan Osborne, although being seventeen (17) years of age, frequented beer parlors until the early hours of the morning and was subject to little or no supervision from her mother with whom she lived in Conneaut, Ohio. In other words, Susan Osborne was a person with far more worldly experience than the average girl of her age.

The evidence established that on the night of Monday, September 14, 1964, the defendant and his wife made the rounds of several beer parlors accompanied by one Norman Balcomb, a friend of the defendant. While on these rounds, they came in contact with the deceased girl, Susan Osborne, at a beer parlor and she accompanied them for the remainder of the evening. During the course of the evening the evidence showed that Susan Osborne consumed several drinks of rum and possibly some beer. At about midnight, defendant's wife, Marcia Pruett, who was pregnant, requested to be taken home. After this was done by the defendant and Balcomb, they proceeded to take Susan Osborne to her home in Conneaut, Ohio. At that time, the evidence showed that it was suggested by Balcomb, who lived in Ashtabula, Ohio, that Susan Osborne ride to Ashtabula with the two young men and then the defendant would return her to her home in Conneaut. Pursuant to this arrangement these three people went to Ashtabula in Pruett's Ford automobile, Susan Osborne riding in the back seat with Balcomb and the defendant operating the automobile.

The evidence showed that Balcomb became familiar with Susan Osborne in the back seat of the car. Balcomb, who was a married man, was let out of the car at his home in Ashtabula and Susan Osborne got into the front seat of the automobile with Pruett. Pruett's testimony was to the effect that he had some conversation with the girl and that at a red light on Lake Avenue in Ashtabula, she opened the door and jumped out of the car. Pruett testified that he attempted to follow her, but there was traffic at this point and that he drove around for some time looking for her and that he finally drove home to Conneaut via Route 20 and arrived home at about 1:30 a.m. This testimony as to the time he arrived home was corroborated by the witness, Maxine Morgan, the defendant's wife, and by the defendant's mother-in-law, Marjorie Clowes. The uncontradicted evidence of his wife was that there were no blood stains on his clothes and that he had no marks of violence on his body when he arrived home.

The defendant and his wife arose early the following morning when the defendant took his wife to work in Ashtabula and he himself went to the Manpower

Training School. Marcia Pruett testified there was no evidence of any blood on the inside of the car.

On Saturday, September 19, 1964, Susan Osborne's nude body was found in some weeds lying about one hundred (100) feet from Lake Road in Ashtabula Township, this area being reached by a lane running south from Lake Road. The authorities were called and it was found that the girl had been dead for some time, that all of her clothing had been removed, a part of same lying on the ground near her and part of the clothing folded nearly under her buttocks. Some of the clothing was quite bloody, the face and neck had started to decompose, some of the facial bones, the jaw and the hyoid bone were broken, there was profuse hemorrhaging around the larynx and trachea and there were multiple severe fractures of all facial bones and lower jaw. There was no evidence of forcible removal of the girl's clothing. (R. Vol. 1, pp. 166-167).

At the autopsy, a swab was made to determine the presence or absence of any seminal fluid and no seminal fluid or sperm cells were found. There were no bruises or injuries of any kind around the exterior genitalia or thighs of the deceased girl, which according to the testimony, contraindicated any evidence of force being used to compel her to submit to sexual relations. The evidence clearly showed on both sides of the case that there was no definite proof that the girl had engaged in sexual relations prior to or following her death. Dr. J. R. Higerd, the County Coroner, was unable to say that there had been any sexual assault. (R. Vol. 1, p. 167).

It was discovered on Sunday, September 20, 1964, by the authorities that the defendant was the last known person to have been with the deceased girl. He was picked up shortly before noon on Sunday, September 20, 1964, and was not given benefit of counsel. Deputy Sheriff Roach testified that when he questioned the defendant at the police station in Ashtabula shortly after having picked him up at his home, that the defendant told him that he had taken the girl to the scene of the crime but that she got out of the car and he started to get out after her and at that time he stopped talking and refused to talk further. There was no corroboration of Roach's story. The defendant vehemently denied that he had made this statement and stated that he had told the witness Roach that the deceased girl had gotten out of the car on Lake Avenue and that he started to get out after her, but did not on account of traffic. The evidence showed that Roach made no effort

to write down any statement made at the police station and made no effort to call in any other officers to hear the alleged statement made by the defendant. Furthermore there was no evidence showing that the defendant was fully advised of his rights, particularly his right to remain silent and that anything he might say might be used against him.

The defendant was never released from custody following the time he was picked up by officers shortly before noon on September 20, 1964, and the defense maintains that he was placed under arrest when he was taken into custody at his home at said time. Later the same day, the defendant was further questioned by the officers and made no admissions of any kind as to guilt and requested that he be given benefit of counsel.

After the defendant's arrest and at a different place than the place where he was arrested, the defendant's Ford automobile, was taken by the proprietor of a private garage on the order of the Sheriff, to this private garage on the outskirts of Ashtabula, Ohio. Later in the same week, the exact time not appearing in the evidence, there were certain articles removed from the car, to-wit: a radio grille and a seat cover. A search warrant was never obtained by the authorities either prior to seizing the car on September 20th or prior to the searching of the car at an unknown subsequent time during that week. Prior to the commencement of the trial a motion to suppress the evidence obtained from the car was filed by the defendant, and at the original hearing of said motion by the Court, the motion was sustained and the Court ruled that the articles taken from the car were not competent evidence. The State filed an application for a re-hearing which was granted and following the re-hearing, the Court reversed its prior holding and overruled the motion to suppress.

This case came on for trial on February 1, 1965, the trial being concluded on Feburary 23, 1965. A motion was made by the defense that the defendant be discharged at the conclusion of the State's case which was overruled by the Court, this motion being renewed at the conclusion of all of the evidence, same being overruled by the Court. The case was submitted to the jury on February 23, 1965, and the jury returned a verdict of guilty of murder in the first degree without a recommendation of mercy.

A motion for a new trial was duly filed and argued at length and same was overruled by the trial Court. An appeal was taken on questions of law to

the Court of Appeals and on the 23rd day of June, 1967, a journal entry was filed in the Court of Appeals affirming the judgment of the lower court, the Court of Appeals writing a very brief opinion and failing to touch upon many of the important constitutional questions raised in this case.

Notice of Appeal was duly filed appealing this case to the Supreme Court of Ohio from the final order of the Court of Appeals of the Seventh District of Ohio, and a Memorandum in Support of Jurisdiction was filed in the Supreme Court of Ohio. A referee was appointed by the Ohio Supreme Court to hear arguments of counsel as to why the Ohio Supreme Court should take jurisdiction of this case and after the case was argued before the Referee and without hearing the case on its merits, the Ohio Supreme Court dismissed the appeal sua sponte. No opinion was ever rendered by the Ohio Supreme Court. The last opinion in this case was rendered by the Court of Appeals of the Seventh District of Ohio.

REASONS FOR GRANTING THE WRIT

FIRST REASON

We contend that the search and seizure of the defendant's Ford automobile was unlawful in that it was conducted in violation of the 4th Amendment to the Federal Constitution, and, therefore, the car itself was erroneously admitted into evidence as was also certain material taken therefrom.

U. S. v. Valentine, C C. Tenn. (1962) 202 Fed. Supp. 677 holds that the 4th Amendment must be given broad and liberal construction in favor of the individual citizen in order to thwart illegal invasion of constitutional safeguards to the end that this Amendment may at times defend the guilty, but may also protect the innocent.

The 4th Amendment to the Federal Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

Ohio Revised Code 2933.23 provides as follows:

> "A warrant for search shall not be issued until there is filed with the judge or magistrate an affidavit particularly describing the house or place to be searched, the person to be seized, the things to be searched for and seized, and alleging substantially the offense in relation thereto, and that the complainant believes and has good cause to believe that such things are there concealed, and he shall

> state the facts upon which such belief is based. The judge or magistrate may demand other and further evidence before issuing such warrant. If the judge or magistrate is satisfied that grounds for the issuance of a warrant exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched."

Under the evidence in this case, to-wit: that the defendant's automobile was standing in the driveway of the house in which he was living at the time he was taken into custody by the police; that he was subsequently taken to jail in Jefferson, Ohio; that the car was then removed to a place other than the place where the defendant was taken into custody; that at least several days after the defendant was incarcerated, the car was searched; that at no time during this procedure was a search warrant issued; and that certain items taken from the car were later introduced into evidence, and the car itself was introduced into evidence over the objection of the defendant, both by way of motion to suppress and an objection at the time of the trial, it is submitted that the search and seizure of the defendant's automobile was illegal and the subsequent admission in evidence of the car itself and the portion of the interior taken from the car was likewise improper being in violation of the 4th Amendment to the Federal Constitution.

In support of this contention we wish to refer the Court to Fahy v. Connecticut, 375 U. S. 85, (1963), wherein the Court said:

> "Where evidence which has been found as a result of an illegal search, has not been suppressed on request and has been erroneously admitted against a defendant, a conviction should be set aside if it appears that there is a reasonable possibility that the admission of such evidence contributed to the conviction." See also Stoner v. California, 376 U. S. 483; Preston v. U. S., 376 U. S. 364; Mapp v. Ohio, 367 U. S. 343 (1961).

In the instant case the admission into evidence of the car itself and the portion of the interior taken from the car, found as the result of the illegal search was not suppressed on motion of the defendant made prior to the trial. It is established now that in the light of the decision in the Mapp case and Ker v. California, 374 U. S. 23 (1963), that the 14th Amendment of the United States Constitution picks up the 4th Amendment, and applies it to state courts, including the federal standards that have developed thereunder. The 14th Amendment of the United States Constitution reads in part as follows:

". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws."

It is the contention of the defendant that the search and seizure of his automobile in order to have been legal must have been made substantially contemporaneous with the arrest as to time and place. The search and seizure also must be incidental to a lawful arrest. The leading case here is Agnello v. U. S., 70 L. Ed. 145 (1925). In this case the defendant was arrested in the house of a man named Alba. He was taken to the police station and while being interrogated, other officers went to Agnello's house and, without a warrant, searched for and seized a quantity of cocaine. During the trial of the case, the State attempted to use the cocaine in evidence, but it was excluded by the Court. In its opinion the Court said:

"Frank Agnello's house was several blocks distant from Alba's house, where the arrest was made. When it was entered and searched, the conspiracy was ended, and the defendants were under arrest and in custody elsewhere. That search cannot be sustained as an incident of the arrest."

The Agnello case is important because of several later cases which relied on the distinction which the Court made between a search and seizure being made in the vicinity of the arrest and about the same time, and a search and seizure made at a place different than the arrest and at a different time. In the Agnello case, the arrest was at the house of a man named Alba, and yet the the search and seizure was at a different house and later in the same day. In the case of Stoner v. California, 84 S. Ct. 889 (1964), where a room of a guest of a hotel was searched without a warrant, the Court excluded evidence obtained in the search as the search was not an incident to the arrest. The Court in citing and relying on the Agnello case laid down the basic test in this area as to what is "incident to an arrest." In this connection the Court said:

"But a search can be incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest." (Underscoring supplied). Agnello v. U. S. 46 S. Ct. 4.

Soon after the Stoner and Preston cases, the Ohio Supreme Court spoke unanimously on this subject. In the case of State v. Burnius, 177 Ohio State 155,

(decided December 23, 1964), the entire Court speaking through Taft, C. J. said:

> "The Supreme Court of the United States has held that the Fourteenth Amendment to the Constitution of the United States now requires a state court to suppress any evidence, no matter how reliable, acquired as a result of an unreasonable search. This represents a departure from its previous decisions on this precise question. (Mapp v. Ohio, (1961) 367 U. S. 643, 672). However much the writer may disagree with the most recent holding of the Supreme Court on this question or question its wisdom or soundness, we are required to follow it just as we followed its previous holding on the same question. (See State v. Mapp 170 Ohio State 427.)
>
> "The search of defendant's automobile, having been made after the possessor of the automobile had been arrested and removed with the automobile to the police station, cannot be justified as incident to a lawful arrest." (Preston v. U. S. (1964) 376 U. S. 364).

The defendant objected at every stage of the proceedings to the illegal search and seizure and the admission of evidence resulting therefrom. A motion to suppress the evidence illegally obtained was filed prior to the actual trial of the case. This motion was sustained by the Court, a portion of his opinion being as follows, to-wit:

> ". . . we have to recognize that under the circumstances shown Pruett has an interest in the car sufficient to let him object and raise the issue concerning this search, the next question being whether or not in the light of the recent decisions this was a lawful search. Well, I don't think too much need be said on that either.
>
> ". . . I think the thing that makes the difference is that after the arrest, and by the way, the transcript shows that the affidavit was filed on the 20th, the same day as the arrest, the evidence in this motion shows that the search was not made until some time during the following week, and it hasn't been specifically pointed up as to when.
>
> "Now after the car was in possession of the law, certainly then a search warrant could have been obtained easily enough. It wasn't, and of course, that is the issue we are dealing with. Was it necessary? While I may have some personal opinions about some of these rules, I have to follow what I plainly see and I don't see how this search under these circumstances, in view of these rules or the rule as announced in several of these cases, can be justified.
>
> "The motion to suppress will be sustained and the prosecution ordered to return the car, the radio and the piece of the seatcover."

Immediately following the hearing on the motion to suppress, a motion was filed by the State to re-open the hearing which was granted by the Court. The only additional testimony given on behalf of the State was that it had evidence to prove that the automobile was an instrument or implement used in the commission of the crime. (R. Vol. 1, p. 116). The Court thereupon re-opened the hearing, reversed its former holding, and when the automobile and the parts taken therefrom were offered in evidence at the trial, same was admitted over the objection of the defendant. It is submitted that the mere fact that the deceased girl might have been transported in the car during the night of the alleged murder, did not make the automobile an instrument or implement used in the commission of the crime. Furthermore, this evidence was available at the first hearing on the motion.

The Court in reversing itself stated that the automobile could be searched and seized because the officers had "probable cause to believe that a motor vehicle has been used in connection with the commission of the crime, not necessarily the instrumentality alone by means of which the death is caused. . . ." (R. Vol 1, p. 153). The Court did not hold that the automobile was an instrument or implement in connection with the commission of the crime, but only that the officers had probable cause to believe the automobile had been used in connection with the commission of the crime, completely ignoring the decisions of the United States Supreme Court previously cited in this Petition and the Burnius case.

Nowhere does the law warrant seizure and search of an object which is used in connection with the commission of the crime without a search warrant. The car itself and the material taken therefrom were purely evidentiary matters and, therefore, were improperly admitted into evidence. With reference to the seizure of purely evidentiary matters, a good summation of the legal principle involved here is contained fn 47 Am. Jur. Supp. pp. 69-70, wherein it is stated:

> "Thus it is clear that a search of premises without a warrant, made in connection with a lawful arrest, is not by nature an unlawful search, nor is it by its nature lawful; the right to make such a search is a strictly limited one; only a reasonable search is permissible, and the bounds of reasonableness are overstepped when (1) the premises searched are separated from the place where the arrest was made or (2) the search is a 'general' and 'exploratory' one; or (3) the search has as its purpose the seizure of things to be used purely as evidence (as distinguished from the fruits of the crime--such as stolen property--and the means by which it was committed). . . ." (underscoring supplied.)

Two recent Supreme Court cases which distinguish between instrumentalities and evidentiary matters are U. S. v. Bayette, 299 Fed. (2d) 92 and Abel v. U. S., 4 L. Ed. (2d) 668. When the instant case was tried, the car, radio grille, and seatcovers were all admitted in evidence over the objection of the defense, the same arguments being advanced at that time that were advanced at the hearing on the motion to suppress, but the trial Court entirely ignored the ample authorities dealing with unlawful search and seizure and admitted all of the exhibits.

SECOND REASON

After the defendant Pruett was arrested and taken from his home at about noon on September 21, 1964, he was taken immediately to the police station by Deputy Roach who testified extensively in this case. It was there that Deputy Roach claimed that the defendant told him he had taken the girl to the scene of the crime, that she got out of the car and he got out of the car after her, and this is when Roach said the defendant said several times, "I didn't do it." (R. Vol. 2, pp. 527, 530, 840, 843).

The testimony of the defendant and Deputy Roach conflict considerably, but Roach admitted on cross-examination that he did discuss the offenses of first and second degree murder with the defendant, although he denied that he told the defendant that he would help him if he gave Roach a statement. The defendant's testimony was to the effect that Roach told him about the different degrees of homicide and told him if he would tell him what happened, that the offense, which he assumed would be first degree murder, would be reduced. When Roach was cross-examined as to his reasons for discussing the different degrees of homicide with the defendant, the following questions were asked and the following answers were given:

"Q. Didn't you tell him at that time that if he would tell you how this was done and admit this that you would help him?

MR. MAHONEY: Objection, Your Honor. He has already answered that.

THE COURT: Overruled. You may answer. Read the question.

(Question read.)

"A. Only to the extent of taking a statement from him.

Q. Would that be helping him, do you think?

A. I assume it would." (R. Vol. 2, p. 428).

Roach further admitted that he made no notes when the defendant talked with him and that he took no written statement from the defendant at the police station. (R. Vol. 2, p. 530). He further admitted that the defendant Pruett was nervous and that no other witness heard the statement allegedly given by the defendant to Deputy Roach although there was plenty of police officers in the vicinity who could have been called in. He further admitted that at all times, the defendant consistently denied that he killed the deceased girl. (R. Vol. 2, p. 532).

Regarding this constitutional question it becomes very important as to what Roach said to the defendant Pruett at the commencement of Roach's and Pruett's conversation at the City Hall immediately following his arrest. Roach's statements in this regard were as follows:

> "I told him that I knew that he had been in the presence of this girl and of how terrible this crime is and I asked him if he wanted to talk to me about it and I advised him that he didn't have to say anything to me until he got an attorney. He could call whoever he wanted for help, but I felt sure if he was involved in this it would be best if he would tell me about it." (R. Vol. 2, p. 445).

This testimony of Roach's was uncorroborated. The defendant's testimony regarding the conversation at the police station with Roach was as follows:

"Q. I want you to tell this jury and this Court as nearly as you can remember what was said in that locker room by you and by Mr. Roach?

"A. Well, I got in there and he says, 'Now, Bob, we know you was the last one seen with this girl. We know that you were going in the direction of where we found her. We know that she would let you make advances above her waist but not below her waist and we would like to know what happened. We know that you did this. We know how you did it and why you did it. And I don't know if you know the punishment for first degree murder; but it is punishable by death in the electric chair.' And he also said at that time that there was lesser punishments that went along with this such as second and manslaughter and if I would tell him what had happened that night he would see if he couldn't get the charge broken down to a lesser degree. He said also that he didn't think that I meant to kill this girl, but that I did and that I should come clean and be honest with him and tell him about it." (R. Vol. 2, pp. 840-841).

The defendant's testimony went on further to the effect that Roach was trying to get him confused, was twisting his story around although he tried to tell Roach that the girl jumped out of his car on Lake Avenue and he also stated that he did not kill the girl.

The stories of these two witnesses are, of course, not reconcilable but there are some similarities. The defendant stated that Roach explained to him the different degrees of homicide and said he would help him if he made a statement. Roach stated in his testimony that he was helping him by taking a statement from him and while he denied that he told the defendant he would use his influence to knock down the degree of homicide, he did admit that he discussed the different degrees of homicide with the defendant. We feel that the question would arise in the mind of any reasonable person as to why in the world Roach would be discussing the different degrees of homicide with the defendant if he did not at the same time hold out to him hope of reducing a charge which might be brought against the defendant downward from first degree murder.

At no place in the Record was the defendant ever told that he had the right to remain silent and that anything he might say could be used against him. This rendered any alleged statement inadmissible. See Alexander v. Green, 2 Ohio State (2d) 231 (1965). The Alexander case was decided after the instant case was tried, and the Court held that before a voluntary statement of a defendant may be used in evidence, he must first be advised that anything he might say may be used against him.

We submit that any statement elicited from the defendant in the police station by Roach was illegally obtained and constituted a violation of the defendant's constitutional rights. Although the alleged statement made by the defendant was not a confession, it was an admission against interest. A leading case on this is Mallory v. U. S., 354 U. S. 449.

In the Mallory case the defendant was a 19 year old lad of limited intelligence who was arrested by the police on suspicion of rape. Even though the police had ample evidence from other sources than the defendant for regarding him as a chief suspect, they first questioned him for approximately one-half hour then asked him to submit to a lie detector test and to another test after four more hours of detention. He was not told of his right to counsel or to preliminary examination before a magistrate, nor was he warned that he might keep silent and that any statement made by him might be used against him. The defendant in the Mallory case was convicted and the death penalty imposed. The Circuit Court affirmed the conviction and the United States Supreme Court reversed it by a unanimous

decision. Justice Frankfurter's opinion was as follows:

> "The arrested person may be 'booked' by the police. But he is not to be taken in to police headquarters to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt."

With reference to the constitutional guarantee of the right to remain silent when a general inquiry has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, and the police have not effectively warned the suspect of his absolute constitutional right to remain silent, in violation of the 14th Amendment to the Federal Constitution, no statement elicited by the police during the interrogation may be used against him at a criminal trial, in accordance with the decision of Escobedo v. Illinois, 32 Ohio Opinions (2d) 31, 378 U. S. 478 (1964). In this case the Court said:

> "We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' Gideon v. Wainwright . . . , and that no statement elicited by the police during the interrogation may be used against him at a criminal trial."

THIRD REASON

The Sixth Amendment to the U. S. Constitution provides in part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . ."

In determining and defining the word "impartiality" the following language is used in Dennis v. U. S., (195) 70 S. Ct. 518, 339 U. S. 162:

> "'Impartiality' is not a technical conception but is a state of mind, and for ascertainment of such mental attitude of appropriate indifference, this amendment guaranteeing impartial jury lays down no particular test for procedure and is not chained to any ancient and artificial formula."

In the instant case we feel that it was clearly shown that the juror Gillespie was guilty of the grossest kind of misconduct when he stated unequivically on his examination as a prospective juror that he had not formed or expressed

an opinion regarding this case. (R. Vol. 2, p. 13). He made the statement again, (R. Vol. 2, p. 14), stating that he could be a fair and impartial juror and that he would be one hundred percent neutral if permitted to sit. Again he testified to the same effect on examination by the Prosecutor. (R. Vol. 2, pp. 20-21). On examination by defense counsel he was asked:

> "Do you have an opinion now as to his guilt or innocence?"

and his answer was:

> "No sir, I do not." (R. Vol. 2, p. 24).

He was further asked by defense counsel:

"Q. But you are sure that there were no accounts that you read or anything that you heard anybody else say that would cause you to form an opinion as to the merits of this case?

"A. No sir."

Later in Mr. Gillespie's testimony (R. Vol. 2, p. 27) he was examined by the Court as to the condition of his wife who he had previously testified was ill and might of necessity have to be taken to the hospital at any time. The Court asked him:

"Q. Let's get at it this way then. How do you feel about it? Do you feel that you could serve in the light of this circumstance or that you could not? We will go from there.

"A. I feel as though I could. If either law enforcement agency or someone would be notified in case of emergency and the boy couldn't be located, that she would be rushed to the hospital because when she gets these attacks she can't breathe. The bronchial tubes close and as long as someone could get her there, I feel I could serve." (R. Vol. 2, pp. 33-34).

The above question and answer is set forth here to show the extreme anxiety on the part of Mr. Gillespie to serve as a juror which ties in with the statements the defense proved that he made before being sworn as a juror showing his prejudice.

The affidavit and testimony of Gene R. Osborne who was a panel member but who was not finally selected to sit as a juror, was to the effect that the juror Gillespie prior to being called for voir dire examination stated on several occasions within Mr. Osborne's hearing, that in his opinion Robert LeRoy Pruett was guilty of the crime for which he was charged and at a later time shortly before Gillespie was called into the jury box, he expressed his opinion very clearly that he thought Pruett was guilty and that he was anxious to serve on the jury because he wanted to see him found guilty. Mr. Osborne not only gave

his affidavit which was admitted in evidence but he testified to substantially the same things that were covered in his affidavit. (R. Vol. 2, Supp. pp. 2-28). In his testimony he stated that he heard Gillespie state his opinion several times prior to being sworn as a juror, and he testified that Gillespie said he thought the defendant was guilty and there were other people around in the vicinity, although he could not tell exactly who they were but he believed prospective jurors Shannon and Ball were there. His testimony is replete both with statements on direct and cross-examination that he heard Gillespie say he thought the defendant was guilty and although the Prosecutor on cross-examination tried to shake him in this regard, he insisted throughout his cross-examination that he had heard these statements.

Another prospective juror who was not finally selected to sit but who was on the panel was William Shannon, who was called by the State on the hearing of the motion for a new trial. He stated on cross-examination (R. Vol. 2, Supp. p. 62), that he heard Gillespie state before he was finally chosen as a juror that he would like to sit on the jury, which simply adds to the misconduct of the juror who has formed an opinion, has expressed it and then makes the statement he wants to sit on the jury. How could any Court say that such a man could be fair and impartial?

The Court in his opinion overruling the motion for a new trial would not admit the affidavit of the juror Vivian Hall, this affidavit being to the effect that the jurors freely discussed the evidence in the case after they had been sworn as jurors and during the progress of the trial.

The affidavit of Mrs. Hall is replete with derogatory statements made by various members of the jury regarding the defendant and in particular statements made by the juror James Gillespie, who said at one time that he thought the defendant was guilty and as the case progressed, he said at various times in substance "my mind hasn't changed". Mrs. Hall's affidavit stated that on one occasion in response to what Mr. Gillespie had said, Mrs. Hall said in substance, "What do you mean, your mind hasn't been changed?" Mr. Gillespie said in substance, "Can't you see the man is guilty?". It must be borne in mind that all of the matters contained in Mrs. Hall's affidavit took place prior to the final submission of the case to the jury, some of the occurrences transpiring outside the jury room.

The matters contained in the affidavit and testimony of Gene R. Osborne were not instances occurring after Gillespie had been sworn as a juror, but rather all of these matters occurred prior to his final selection as a juror. Following the statements mentioned above, he took the jury box and on his voir dire swore that he had no opinions and could be a fair and impartial juror. Can it be said, in view of this clearly proven misconduct on the part of Gillespie that the defendant had a fair and impartial trial by a fair and impartial jury? We emphatically say that it cannot.

In the case of Carr v. State, 22 Ohio Appellate 78, the Court said:

> ""Juror who, on his voir dire in bribery prosecution, falsely stated that he had not formed or expressed an opinion as to accused's guilt, held not qualified as juror, and conviction must be reversed."

There are other Ohio citations too numerous to set forth in this Petition.

The trial Court held in overruling the motion for a new trial that the affidavit of Vivian Hall was inadmissible because evidence aliunde had not been offered. It is submitted that the testimony of the prospective juror, Gene R. Osborne, who was never sworn as a juror, was sufficient evidence aliunde to have permitted Mrs. Hall's affidavit to have been admitted in evidence and to have been considered by the Court. The evidence of Gene R. Osborne both by affidavit and by way of his testimony was evidence as to matters occurring before the jury was finally sworn and had to do with misconduct, particularly of Mr. Gillespie, and we submit this evidence was sufficient to have afforded the trial Court the right to consider Vivian Hall's affidavit, and it also being in our opinion amply sufficient forthis Court to assume jurisdiction.

FOURTH REASON

It is contended that the Court erred in permitting the indictment in this case to be amended. (R. Vol. 2, pp. 589, 590, 591).

The indictment as returned by the Grand Jury reads as follows:

"State of Ohio, Ashtabula County, SS. In the Court of Common Pleas Ashtabula County, Ohio, of the Term of September in the Year of Our Lord 1964, recalled, the jurors of the Grand Jury of the State of Ohio within and for the body of the County of Ashtabula, impaneled, sworn and charged to inquire of crimes and offenses committed within the said County of Ashtabula in the name and by authority of the

the State of Ohio upon their oaths do find and present that one Robert LeRoy Pruett, late of said County, on or about the 15th day of September, in the year of Our Lord 1964, with force and arms in said County of Ashtabula and State of Ohio, did unlawfully, purposely and while in the perpetration of a rape kill Susan Osborne; contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Ohio." The amendment to the indictment permitted by the Court consisted of the insertion of the following words, "or attempting to perpetrate a rape" immediately following the words "in the perpetration of a rape."

The indictment in this case was brought under Ohio Revised Code 2901.01 a portion of which Statute reads as follows:

> "No person shall purposely, either of deliberate or premeditated malice, or by means of poison, or in perpetration or attempting to perpetrate rape, arson, robbery, or burglary, kill another."

Ohio Revised Code 2941.30 provides for the amending of an indictment and reads in part as follows:

> "The Court may at any time before, during, or after a trial amend the indictment, information, or Bill of Particulars, in respect to any defect, imperfection or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime."

The reading of Ohio Revised Code 2941.30 clearly indicates that no change in the name or identity of the crime charged may be permitted by amendment and this Section does permit amendment "in respect to a defect, imperfection or omission in form or substance, or any variance with the evidence, . . ." The Record does not disclose that the Prosecutor advanced any reasons why he decided to amend the indictment, the arguments of counsel on both sides not appearing in the Record. However, defense counsel strongly argued against the amending of the indictment for the following reasons, to-wit:

(1) A new crime was added to the indictment, to-wit: "while attempting to commit rape."

(2) The amendment could not possibly have been made "in respect to any defect, imperfection or omission in form or substance, or of any variance with the evidence . . ."

In discussing our first ground of objection, the reading of the Statute under which the indictment was brought, to-wit: Ohio Revised Code 2901.01,

discloses that there is a crime of killing another in perpetrating rape and also a crime of killing another in attempting to perpetrate a rape. The indictment as originally returned by the Grand Jury properly charged the crime of murder in perpetrating a rape. There was no defect, imperfection or omission in form or substance in the original indictment. Therefore, it could not be amended with respect to these matters. If the Grand Jury failed to indict for murder while attempting to commit a rape, this could have been remedied by the recalling of the Grand Jury and the returning of another indictment. However, it is submitted that this new offense could not be added to the original indictment because this would be contrary to Ohio Revised Code 2941.30.

With reference to our second ground of objection to the amending of the indictment, a careful reading of the Record will clearly disclose that the indictment could not possibly be amended in respect to any variance with the evidence. It was not proven by the evidence in this case that a rape was committed and there was absolutely no evidence in the case that a rape was attempted. However, it may be stated at this point that the uncontradicted facts in this case contraindicate an attempt to rape and likewise, contraindicate the actual rape itself as alleged in the original indictment. See State v. Wozniak, 172 Ohio State 517, State v. Cimpritz, 158 Ohio State 490, State v. Presler, 112 Ohio Appellate 437. Also see Harris v. State, 125 Ohio State 257.

In the Harris case the Court said:

> "The material and essential facts constituting an offense are found by the presentment of the grand jury; and if one of the vital and material elements identifying and characterizing the crime has been omitted from the indictment such defective indictment is insufficient to charge an offense, and cannot be cured by the Court, as such a procedure would not only violate the constitutional rights of the accused, but would allow the Court to convict him on an indictment essentially different from that found by the grand jury."

The following language is found in the Wozniak case:

> "Any other holding in a case such as this would be inconsistent with the provisions of Section 10 of Article I of the Constitution of Ohio providing that 'no person shall be held to answer for' a crime such as this 'unless on presentment or indictment of a grand jury.' To require defendants to answer for the crime sought to be charged in count one of this indictment after amendment of the indictment by addition thereto of a missing charge of an essential element of that crime would be to require defendants to answer for a crime

other than on 'presentment or indictment of a grand jury'. In order to justify conviction of a defendant for such a crime, the grand jury and not the prosecutor, even with the approval of the Court, must charge the defendant with each essential element of that crime."

FIFTH REASON

After the defendant had rested his case the State in rebuttal offered further evidence by way of the testimony of Rosemary Karr. (commencing R. Vol. 2, p. 1181). Mrs. Karr testified in substance that she and her husband lived in a house which in general abuts the southeast corner of the residence property of Maxine Morgan, the defendant and his wife living at that time at the Morgan residence. Mrs. Karr testified in substance that during the early morning of September 15, 1964, she was asleep in one of their bedrooms which was on the north side of their home and which had windows facing in the direction of the Maxine Morgan residence. She testified that about 2:30 a,m. she awoke and as she was quite awake, she turned on her radio. This testimony was objected to by the defense as not being rebuttal evidence but the objection was overruled. She testified that she laid awake and then Maxine Morgan's light went on, which consisted of a floodlight located over her back door. She said that a few seconds later she heard a door slam and saw Marcia Pruett, defendant's wife, run across the driveway to the east and down the Morgan driveway to the north and then to the east towards town. Her testimony was that this occurred at about 3:10 a.m. She also testified that this was a very nice, clear night. At this point defense offered strenuous objection asking that the testimony be stricken as not rebuttal which was overruled by the Court. (R. Vol. 2, pp. 1187-1188).

On cross-examination Mrs. Karr testified that there was a high hedge between her residence and the Morgan residence. (R. Vol. 2, p. 1192). She also testified on re-cross-examination that she had not related these facts to the authorities until two nights before she was called to testify in rebuttal. (R. Vol. 2, p. 1196).

The State thereupon rested and the defense at this juncture asked the Court to re-open its case to put in further testimony or, in the event that was denied, for the right to offer surrebuttal evidence refuting in particular the testimony of the State's rebuttal witness, Rosemary Karr. (R. Vol. 2, pp. 1215-1221). The defense directed the Court's attention to Ohio Revised Code 2945.10,

which sets out the order of proceedings in a criminal case, and which provides in part:

> "(D) The State will then be confined to rebuttal evidence, but the Court, for good reason, in furtherance of justice, may permit evidence to be offered by either side out of its order.
>
> "(G) . . . The Court may deviate from the order of proceedings listed in this section."

After the defense brought to the Court's attention several authorities and discussed its position, the Court overruled defendant's motion and the defense proceeded by calling to the stand the witness Maxine Morgan. The Court permitted the witness to answer preliminary questions, however, the substance of her testimony was excluded and the defense placed the same in the Record by the method of asking a question, and when the same was objected to by the State and the objection sustained, proffering the answer.

In essence the proffered testimony of Maxine Morgan was to the effect that during the early morning of September 15, 1964, she was at her residence at 519 Liberty Street, Conneaut, Ohio, and was up and about until she retired at 2:30 a.m.; that during said period she heard no slamming of her back door; that her bedroom was on the first floor of the house and that her bed was within six (6) feet of the lower end of the stairway which leads to the second floor and fifteen (15) feet from the back door of her residence; that at about the hour of 3:10 a.m., of the morning of September 15, 1964, she was awake and that no person left her house; that when the floodlight on her back door is illuminated, it shines into her bedroom, but that on the morning of September 15, 1964, at about 3:10 a.m. the floodlight did not shine into her bedroom; that the stairs leading to the second floor of her house are creaky; and that at the back of her property along the southerly line of the same and in front of the Karr residence on September 15, 1964, there existed a high hedge approximately twenty (20) feet in height which during the month of September was very luxuriant. (R. Vol. 2, pp. 1222-1235).

At this point the defense had its Exhibits G, H, I, and J marked for identification one of which was a photograph taken in Miss Morgan's back yard on September 7, 1964, exactly one week prior to September 14, 1964, with the camera pointing in a southeast direction showing the foliage which existed at that

time on that portion of the hedge at the back of her property with the Karr house in the background, the remaining photographs being taken at a later time during the winter months when there was no foliage on the hedge but showing general views of the hedge with reference to the Karr residence and general views of the Karr residence, the Adamack residence, the Morgan residence, the back yard of the Morgan residence and the high hedge, all with reference to each other.

The defense then called Marjorie Clowes to testify for the same reason as the preceding witness. With the exception of several preliminary questions, the testimony of this witness was also excluded, and the Record was made up in the same fashion as with the witness Maxine Morgan. The proffered testimony in essence was as follows, to-wit: that Mrs. Clowes was the mother of Marcia Pruett; that her bedroom in the Morgan house was on the second floor a short distance from the top of the stairway and almost directly over the back door; that the stairs on the morning of September 15, 1964, were creaky and that on said morning at or about 3:10 a.m. no one left the Morgan house or slammed the back door and that she was awake during the entire evening and during the early morning until approximately 3:30 a. m. (R. Vol. 2, pp. 1231-1243).

The defense then offered three witnesses: Wilber P. Dyer, John Tyler, and David Weir, on the same basis as the preceding witnesses, namely, to rebut the testimony of the State's witness, Rosemary Karr and the Court excluded the testimony of these three witnesses and the testimony was proferred by the defense in the same fashion as was done with the witnesses, Morgan and Clowes. (R. Vol. 2, pp. 1242-1264.)

It is the contention of the defense and was strongly urged during the trial that the evidence of the witness Rosemary Karr was not rebuttal evidence and should not have been permitted after the defense rested. If it had any value at all to the State, its value would have been as direct evidence because apparently what the State was trying to imply by this evidence was that the defendant was not home at 3:00 a.m. on the morning of September 15, 1964, and that his wife left the house in an effort to find him. Had this been presented in chief, which would have been the proper time, there would have been no question about the right of defense to present its evidence in opposition in the defense in chief.

Be that as it may, the Court did permit this evidence to be introduced as rebuttal evidence which we submit was highly improper, the jury having heard this evidence. However, in furtherance of justice and by virtue of Ohio Revised Code 2945.10, we feel that it was the duty of the Court to exercise its discretion liberally towards the defendant and not take the narrow view which was taken by the Court. The Court went so far as to permit the defendant and his wife to testify in what may be called surrebuttal but then cut the evidence off and did not permit the disinterested witnesses offered by the defense to testify. This we submit as one of the grossest errors against this defendant and was certainly a flagrant abuse of the Court's discretion. In support of our contention, we would like to refer to several Ohio authorities.

In the case of Itskin v. State, 51 Ohio Appellate 211 (1953), the Court said:

> "The other error complained of in the Itskin case relates to certain rebuttal, which the defense contends was not proper rebuttal, and should have been offered in chief."

The record in the Itskin case discloses no objection to the witness being called for rebuttal, and the Court then permitted Itskin to call a witness for surrebutal. There was no prejudicial error in what was done.

The Itskin case clearly holds that there exists in Ohio the right for the defense to submit surrebuttal in answer to rebuttal by the State in criminal cases. Further it would appear that the defendant went one step further in the instant case in improving his position over the Itskin case in that the defense objected to the State's so-called rebuttal evidence (Rosemary Karr) whereas in the Itskin case, the defense was permitted surrebuttal even though he did not choose to object to the State's rebuttal evidence.

Further in the Itskin case, it would appear that the rebuttal evidence offered actually was evidence that should have been offered in chief. The Court let the evidence in, however, in rebuttal, which is all the more reason why the defendant should have had the right to surrebuttal.

Another very important case in Ohio is the case of Donald v. State, 11 Ohio Circuit Decisions 483 (1900). In this case the Court said:

> "By the law of evidence testimony competent in chief, by that fact is rendered incompetent in reply. The rule, however, is subject to the discretional authority of a trial court to re-open a case in chief at any time before it is finally closed and let such evidence in. But this should not be done when without fault on his part, the

reason of the discharge of witnesses, or otherwise, a party would be cut off from an answer to the new testimony, which he might have made if it had been regularly given.

". . . I presume all trial courts have re-opened cases for the purpose of letting in, during the reply, new evidence that properly and strictly would be in chief. But in connection with that, the rule always has been, as we have understood and seen it applied that if the plaintiff re-opens, the defendant has a right to rejoin. (Underscoring supplied.)

In State v. Lett, 106 Ohio Appellate 285, (1958), the State put evidence on in rebuttal and the Court held:

"Inasmuch as the defendant first raised the issue and produced his evidence in support thereof, the State was entitled to an opportunity to rebut it. In doing so, the State introduced no new matter, so that there was no occasion for surrebuttal by defendant." (Underscoring supplied.)

This case again recognizes the right of the defendant to present surrebuttal if the State has introduced new matter in its rebuttal testimony. A reading of the Record in the instant case clearly demonstrates that the testimony of Rosemary Karr was new matter.

With reference to the construction of Ohio Revised Code 2945.10, the Court's attention is directed to the case of State v. Miles, 41 Ohio Law Abstract 1 (1943). In this case the Court permitted the State while in the midst of examining a rebuttal witness, to stop, re-open the defense's case in chief for further cross-examination of a defense witness and then go back to further examination of its own rebuttal witness. The Court in permitting this went back to the Statute which preceded Ohio Revised Code 2945.10 and which was in effect in 1929 and provided:

"The State will then be confined to rebuttal evidence unless the Court for good reason in furtherance of justice shall permit it to offer evidence in chief."

The old Statute was much more liberal and it would not be difficult to see how the Court in the Miles case would reach the decision it did if it were operating under the Statute. However, the liberal form of this Statute was changed in 1929 and the Court in the Miles case (1943) still adhered to the liberal construction by allowing this evidence in chief. This case, therefore, stands for the proposition here that the Court, in addition to having the power to permit the defense to offer surrebuttal, could have also attacked the problem not through the doctrine of surrebuttal, but by virtue of the Miles case, could have permitted the defen-

dant to re-open his case in chief, and then offer his evidence in refuting the testimony of Rosemary Karr. In passing let it be said that all of these cases show a very broad power in the Court to permit justice to be done. It must be borne in mind that this was a first degree murder case wherein the defendant's life was at stake which is all the more reason for the Court exercising a wide discretion in furtherance of justice.

Another case decided since the present Statute has been in effect, which shows how far the Courts have gone in applying the wide discretion of the trial judge in furtherance of justice, is the case of Vecchio v. State, 8 Ohio Law Abstract 335 (1930), where the Court permitted the State to re-open the case and put in testimony as to the age of the defendant after the case had been submitted to the jury saying that, "We think it would have been great error on the part of the Court under such a situation to refuse the application of the State even at that point in the trial, to offer evidence concerning the defendant's age."

SIXTH REASON

The defendant stands convicted of murder in the first degree as that offense is defined in Ohio Revised Code, Section 2901.01. The penalty clause of this section of the Ohio Revised Code provides that "unless the jury trying the accused recommends mercy", the violator "shall be punished by death". Unless this Court entertains favorable disposition of this application, the defendant will die at the hands of the State of Ohio.

While it is recognized that there is prior authority to the contrary so far as capital punishment is concerned, we respectfully urge that this Court again consider the question as to whether or not the putting of an individual to death by the State in a deliberate and premeditated fashion violates the Eighth Amendment to the United States Constitution which prohibits the infliction of cruel and unusual punishment. It is contended that under our present day moral principles, the putting to death of an individual even by a State is "cruel and unusual" and, of course, the Eighth Amendment is applicable to the states through the due process clause of the Fourteenth Amendment.

Present civilized standards would seem to indicate that the death penalty while approved over the years by State and Federal Courts alike, should now be done away with in view of our changing times and the view which is taken by all moral people on the sanctity of human life. As a matter of morals the State of Ohio, or any other state for that matter, is no more justified in taking the life of a human being than is an individual. Many states have abolished capital punishment within their limits and the time has come when this penalty should be abolished in every state by a holding of this Court.

SEVENTH REASON

The Sixth Amendment to the United States Constitution provides in part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . ."

It is submitted that the exclusion of prospective jurors on the sole ground that they are opposed to capital punishment prevents the defendant from having a fair and impartial trial by a fair and impartial jury. The net result of applying the rule of excluding all persons who are opposed to capital punishment from sitting on a jury is to inevitably get a jury of twelve people, all of whom favor capital punishment. While we know of no authority sustaining our position in this regard, it is strongly urged that this Court should scrutinize this issue very carefully to the end that the determination be made as to whether or not a jury composed of individuals favoring capital punishment is in fact a fair and impartial jury in the trial of a first degree murder case as contemplated by the Sixth Amendment.

CONCLUSION

It is felt that the result reached in this case by the jury, to-wit: conviction of murder in the first degree without a recommendation of mercy, was caused not so much by any evidence produced by the State, as it was by the brutal and tragic death of the deceased and the horrible and repugnant conditions surrounding the finding of the body. This may be understandable when one considers that jurors are persons devoid of legal experience and are controlled to a large extent by emotions rather than reason. This undoubtedly contributed to the

extreme verdict returned by the jury in this case.

It is indeed fortunate that in our country even though a crime is revolting to our moral senses, the elements of the trial may be considered by the highest court in our land. We respectfully submit that a careful consideration of the claimed violations of well recognized constitutional safeguards in this case warrants the granting of this Petition for a Writ of Certiorari by this Court.

Respectfully submitted,

NAZOR AND NAZOR

BY Howard M. Nazor

BY Gordon L. Nazor

ATTORNEYS FOR PETITIONER
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Ashtabula, Ohio 44004
216-993-2121

A copy of the within Petition for Writ of Certiorari to the Supreme Court of the State of Ohio and Appendix of the petitioner, Robert LeRoy Pruett, was served upon Joseph E. Mahoney, Prosecuting Attorney of Ashtabula County, Ohio, by handing same to him personally on the 11th day of April, 1968.

NAZOR AND NAZOR

BY Gordon L. Nazor

ATTORNEYS FOR PETITIONER

CONSTITUTION OF THE UNITED STATES:

AMENDMENT IV - SEARCHES AND SEIZURES. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

AMENDMENT VI - RIGHTS OF ACCUSED. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

AMENDMENT VII - EXCESSIVE BAIL, FINES, PUNISHMENTS. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

AMENDMENT XIV - RIGHTS OF CITIZENS. Section 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES.

OHIO REVISED CODE, Section 2901.01. Murder in the first degree. (GC Sections 12400, 12399).

"No person shall purposely, and either of deliberate and premeditated malice, or by means of poison, or in perpetrating or attempting to perpetrate rape, arson, robbery, or burglary, kill another.

Whoever violates this section is guilty of murder in the first degree and shall be punished by death unless the jury trying the accused recommends mercy, in which case the punishment shall be imprisonment for life.

Murder in the first degree is a capital crime under Sections 9 and 10 of Article 1, Ohio Constitution."

OHIO REVISED CODE, Section 2933.23. Affidavit for search warrant. (GC Section 13430-3).

"A warrant for search shall not be issued until there is filed with the judge or magistrate an affidavit particularly describing the house or place to be searched, the person to be seized, the things to be searched for and seized, and alleging substantially the offense in relation thereto, and that the complainant believes and has good cause to believe that such things are there concealed, and he shall state the facts upon which such belief is based. The judge or magistrate may demand other and further evidence before issuing such warrant."

OHIO REVISED CODE, Section 2941.30. Amending an indictment. (GC Section 13437-29).

"The court may at any time before, during, or after a trial amend the indictment, information, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged. If any amendment is made to the substance of the indictment or information or to cure a variance between the indictment or information and the proof, the accused is entitled to a discharge of the jury on his motion, if

a jury has been impaneled, and to a reasonable continuance of the cause, unless it clearly appears from the whole proceedings that he has not been misled or prejudiced by the defect or variance in respect to which the amendment is made, or that his rights will be fully protected by proceeding with the trial, or by a postponement thereof to a later day with the same or another jury. In case a jury is discharged from further consideration of a case under this section, the accused was not in jeopardy. No action of the court in refusing a continuance or postponement under this section is reviewable except after motion to and refusal by the trial court to grant a new trial therefor, and no appeal based upon such action of the court shall be sustained, nor reversal had, unless from consideration of the whole proceedings, the reviewing court finds that the accused was prejudiced in his defense or that a failure of justice resulted."

OHIO REVISED CODE, Section 2945.10. Order of proceedings of trial. (GC Section 13442-8).

"The trial of an issue upon an indictment or information shall proceed before the trial court of jury as follows:

(A) Counsel for the state must first state the case for the prosecution, and may briefly state the evidence by which he expects to sustain it.

(B) The defendant or his counsel must then state his defense, and may briefly state the evidence which he expects to offer in support of it.

(C) The state must first produce its evidence and the defendant shall then produce his evidence.

(D) The state will then be confined to rebutting evidence, but the court, for good reason, in furtherance of justice, may permit evidence to be offered by either side out of its order.

(E) When the evidence is concluded, either party may request instructions to the jury on the points of law, which instructions shall be reduced to writing if either party requests it.

(F) When the evidence is concluded, unless the case is submitted without argument, the counsel for the state shall commence, the defendant or his counsel follow, and the counsel for the state conclude the argument to the jury.

(G) The court, after the argument is concluded and before proceeding with other business, shall forthwith charge the jury. Such charge shall be reduced to writing by the court if either party requests it before the argument to the jury is commenced. Such charge, or

other charge or instruction provided for in this section, when so written and given, shall not be orally qualified, modified, or explained to the jury by the court. Written charges and instructions shall be taken by the jury in their retirement and returned with their verdict into court and remain on file with the papers of the case.

The court may deviate from the order of proceedings listed in this section."

28 U.S.C.A. 1257 (3). STATE COURTS; APPEAL; CERTIORARI

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . .

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under, the United States."

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

19 67 TERM

To wit: December 20, 1967

The State of Ohio,
Plaintiff-Appellee,

vs.

Robert LeRoy Pruett,
Defendant-Appellant.

No. 41163

APPEAL FROM THE COURT OF APPEALS

for ASHTABULA *County*

This cause, here on appeal as of right from the Court of Appeals for CUYAHOGA *County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.* and it appearing to the Court that the date heretofore fixed for the execution of the judgment and sentence of the Court of Common Pleas is now past, this Court proceeding as required by law does hereby fix the 9th day of February, 1968, as the date for carrying said sentence into execution by the Warden of the Ohio Penitentiary, or in his absence by the Deputy Warden, in accordance with the statutes in such case made and provided.

It is further ordered that a certified copy of this entry and a warrant under the seal of this Court be duly certified to the Warden of the Ohio Penitentiary and the Warden make due return thereof to the Clerk of the Court of Common Pleas of Ashtabula County.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the COMMON PLEAS COURT *to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for* ASHTABULA *County for entry.*

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this day of 19

Clerk

Deputy

5

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus. } *19 67 TERM*

To wit: December 20, 1967

The State of Ohio,
Plaintiff-Appellee,
vs.
Robert LeRoy Pruett,
Defendant-Appellant.

No. 41163

MANDATE

To the Honorable COMMON PLEAS COURT

Within and for the County of ASHTABULA, *Ohio, Greeting:*

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Appeal dismissed, sua sponte, no substantial constitutional question involved.

It is also ordered that the execution date be set for Friday February 9, 1968.

THOMAS L. STARTZMAN,
Clerk

..... *19*.....

.....

..... *Deputy*

RECORD OF COSTS

Docket Fee . . . . . $ 20.00 *Paid by* Nazor & Nazor

Docket Fee . . . . . $ *Paid by*

Docket Fee . . . . . $ *Paid by*

Printing Record . . . . . $ *Paid by*

Supplemental Record . . $ *Paid by*

Sheriff's Costs . . . . . $ *Paid by*

Sheriff's Costs . . . . . $ *Paid by*

908 (BLANK-ENTRY) Baker's Reference, Pittsburgh, Pennsylvania, U.S.A.

THE STATE OF OHIO,
City of Columbus.

19 68 TERM

To wit: Thursday, January 4, 1968

The State of Ohio,
Plaintiff-Appellee,

vs.

Robert LeRoy Pruett,
Defendant-Appellant.

No. 41163

ENTRY

Upon consideration of the motion, filed by counsel for Appellant, to stay the execution of sentence pending the timely filing of an appeal to The Supreme Court of the United States, it is therefore

ORDERED that the execution of sentence be, and hereby is, stayed pending the timely filing of an appeal to The Supreme Court of the United States, and it is further ordered that if such appeal is timely filed, this stay will continue for an indefinite period pending final determination by The Supreme Court of the United States.

It is further ORDERED that the Clerk of this Court shall forthwith send a certified copy of this entry staying execution to the Warden of the Ohio Penitentiary, who shall acknowledge receipt thereof.

Kingsley Taft.
CHIEF JUSTICE

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No.....Page.....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 4th *day of* January, *19* 68

THOMAS L. STARTZMAN *Clerk.*

By Jane L. Jennings *Deputy.*

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM 1967

ROBERT LEROY PRUETT

PETITIONER

-VS-

STATE OF OHIO

RESPONDENT

APPENDIX

LAW OFFICES OF
NAZOR & NAZOR
GILLMORE BUILDING
ASHTABULA, OHIO

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 1700M: OCTOBER TERM 1967

RECEIVED
APR 12 1968
OFFICE OF THE CLERK
SUPREME COURT, U.S.

ROBERT LEROY PRUETT

PETITIONER

-vs-

STATE OF OHIO

RESPONDENT

APPENDIX

NAZOR AND NAZOR
ATTORNEYS FOR PETITIONER
Gillmore Building
Ashtabula, Ohio 44004
216-993-2121

THE STATE OF OHIO)
) SS:
ASHTABULA COUNTY)

IN THE COURT OF COMMON PLEAS

No. 8385

THE STATE OF OHIO,

Plaintiff,

-vs-

ROBERT LEROY PRUETT,

Defendant.

OPINION
ON
MOTION FOR NEW TRIAL

Attorneys for Plaintiff:
Joseph E. Mahoney, Prosecuting Attorney
Charles M. Diamond and Francis A. Varckette, Asst. Pros. Attys.

Attorneys for Defendant:
Howard M. Nazor and Gordon ... Nazor, Attorneys at Law, Ashtabula, Ohio.

PONTIUS, J.:

As announced by the Court at the outset of the hearing on the Motion for New Trial, only those matters which are set forth in the motion and which were actually urged upon hearing will be considered and passed upon by the Court in ruling upon this Motion for New Trial. All other matters, concerning which a Motion for New Trial is necessary as a predicate for further action, will be deemed to have been waived by the defendant.

The first ground advanced in the argument is ground 7 of the motion wherein it is claimed the Court abused its discretion, by reason of which the defendant was prevented from having a fair trial and that this occurred in two respects; first, with reference

to the admissibility of certain photographs offered by the State and second, with respect to the Court's action in limiting defense testimony on so-called surrebuttal.

With reference to the photographs of the nude body of the victim, it is admitted by the defense to have been proper to show at least some of such photographs as bearing directly upon the res gestae of the crime and the circumstances there shown. The argument is made, however, that there was an abuse of discretion by the Court in admitting too many of them, that they were shocking in nature, and served only to inflame the jury.

A total of seventeen of such photographs were properly identified and offered in evidence. Four were rejected by the Court and thirteen admitted. No one of these photographs showed all of the following details but all of them together tended to show the following: the nude body in the underbrush as it appeared when the officers first arrived, the clothing of the victim and its condition and relation to the body, the area immediately surrounding the body, the position of it in detail with reference to position of hands and arms, detail as to injuries of the face and head, the medal worn around the neck of the victim (by which identification was made), a chest wound, the area staked out where the body had been immediately after its removal and showing blood spots on the ground, the condition of the ground where the body had lain with stakes marking its prior position.

Generally speaking, and particularly in criminal cases, photographs are admissible, though they be shocking and ghastly in character, when taken of the murder victim to show the condition of the body, the location of it, the nature of the injuries inflicted, and in sex offenses especially, the scene of the crime as bearing on the voluntary character of the claimed assignation. The authorities on this point are myriad in number. Reference is here made to 15 OJ 2d 606; Scott on Photographic Evidence, para. 652, 695, 692, 661, and 866; People vs Northcott, 189 Pac. 704 (Cal.); and a vast number of cases cited in the National Reporter System under Criminal Law at para. 438 and 1169. It is my conclusion that if photographs are admissible for any purpose, they are not to be excluded because they are gruesome, revolting or ghastly if they have any legitimate purpose in describing the res gestae of the crime or otherwise. If such were not the rule, the more horrible the offense being investigated, the more difficult would become the matter of proof, because assuredly matters of this character are most difficult to totally describe by word of mouth only from the witness stand. Realizing that I am here passing upon the exercise of my own discretion, nevertheless I fail to see any claim for abuse of discretion on this point.

The defense testimony tended to show that the defendant had returned home by 1:30 A.M. the morning of September 15th. It also raised an inference, at least, that the wife of the defendant

did not leave the house until they both left together, approximately 6:45 in the morning. In rebuttal, the State produced an eye witness, a close-by neighbor, who saw the defendant's wife leave the house at 3:10 A.M. The defense then offered in so-called surrebuttal photographs, the purpose of which was to prove that the eye witness could not have observed defendant's wife leave, or at least would have great difficulty in doing so, and also offered testimony of two other occupants of the house, who had already testified for the defense, and sought to show through them that defendant's wife in fact had not so left the house. Objection to this proffer was sustained by the Court. The defendant and then his wife each testified that the wife did not in fact so leave the house. This evidence of the defense was offered in substantially the order above set forth.

It is admitted by the defense that under the provisions of R.C. 2945.10, which prescribes the methods of procedure in criminal cases, there is no express provision for the presentation of surrebuttal evidence. The argument, however, is in short that because the defense had no knowledge of this eye witness, the Court in the exercise of its discretion under R.C. 2945.10 should have allowed this refuting evidence.

Even in states where by procedural statutes requirement the endorsement on the indictment or the otherwise giving notice of the names and addresses of the witnesses to be relied upon by the

TEXT IS POOR

State are required, still such a statutory rule does not extend to rebuttal witnesses. See numerous cases cited in 23 CJS, pg. 777, para. 948. The reasoning applied in some of these cases is to the effect that that which is rebuttal in nature is no surprise to the defendant. The rule seems to be well settled in Ohio, as well as elsewhere, that when rebuttal testimony is offered only to refute a defensive issue, no occasion arises for the admission of surrebuttal testimony by the defendant and the denial thereof is not an abuse of discretion. See State vs Lett, 106 OA 285; State vs Blanton, 111 OA 111. Attention is also called to the case of People vs Simms, 393 Ill. 238, 69 NE 2d 86, a case which is almost on all fours with the point raised by the defense in Pruett respecting the proffer through Wilbert Dyer, of testimony concerning the setting of the moon. In Simms, rejection of pages from the almanac to prove there was no moon was upheld and the witness in that case was no more certain on the point than was Mrs. Karr in the Pruett case.

The Court permitted the defendant and his wife to testify, as above noted. The Court's reasoning at the time was substantially this, that an explanation as to why the wife left the house at that hour ought to be allowed. Of course, she denied rather than explained it. This is not to say, however, that because the Court exercised its discretion in that direction with reference to that possible testimony the Court was required to back up and thereafter allow the introduction of the photographs

and other testimony above referred to, or having barred the photographs and other testimony in denial of the witness Karr necessarily meant that the denial should carry through to the wife and the defendant and thereby bar the possible explanation of her leaving the house. It should be kept in mind that the issue of fact was first raised by the defense testimony and not during the State's case in chief. It does not seem that the point of abuse of discretion is well taken.

Under its claim of misconduct of the jury, the defense sought to prove what it claimed amounted to misconduct of the jurors and sought to do so solely through evidence by way of an affidavit of one of the jurors and the oral testimony of another. No evidence aliunde or dehors the proposed testimony of the jurors was offered. The Court ruled such evidence inadmissible. The claim is made that since the acts amounting to claimed misconduct occurred outside the Jury Room, or at least prior to the final submission of the case, that the usual rule of aliunde evidence is not applicable and that the jurors themselves may be called directly to testify concerning such matters and in this way thus impeach their verdict.

Before proceeding further, it should be pointed out that the claimed misconduct, if it were such, deals only with the communications of the jurors among themselves, that is to conversations concerning evidence admitted upon the trial and not in any way touching upon an outside communication or factual matters not

TEXT IS POOR

in evidence. The rule has long been adhered to in this state that affidavits of jurors stating matters of alleged misconduct are not competent to support an application for a new trial unless evidence aliunde is first offered or unless the Court has acquired knowledge of the Jury's behavior from other sources. 16 OJ 2d 56. True, in most instances where the issue has arisen, efforts have been directed toward uncovering what went on in the Jury Room after final submission or with claimed communications with the jurors by outsiders, as distinguished from what is claimed to have transpired before final submission of the case. Examples of this type of cases in Ohio are Farrer vs State, 2 OS 54; Kent vs State, 42 OS 426; Schwindt vs Graeff, 109 OS 404; Wicker vs Cleveland, 150 OS 434; and State vs Miles, 69 NE 2d 39. The rule is one of deep seated public policy to the effect that testimony or affidavits of jurors themselves will not be received for the purpose of impeaching the verdict, at least until other evidence on the subject is first offered.

Whether the claimed misconduct occurred before or after final submission of the case to the jury, the policy involved would be violated in either event if the jurors alone were allowed to thus impune the verdict. Panel members become jurors immediately upon being sworn. The finality of jeopardy then attaches and the jurors certainly do not don a different cloak when the case is finally submitted. This Court believes the rule should be the

TEXT IS POOR

same whether the claim of misconduct occurs before or after final submission of the case. Such seems to be the general rule and the following are just a few of the many cases on the point. State vs Ferguson, 182 SW 2d 38; Huddleston vs State, 64 Southern 2d 90 (Ala.); Cossett vs State, 48 SE 2d 71 (Ga.); State vs Finnell, 280 SW 2d 110 (Mo.); Lindsey vs State, 25 SW 2d 533 (Tenn.); People vs Evans, 246 Pac. 2d 636 (Cal.); State vs Oliver, 192 Southern 725 (La.); and State vs Ingersoll, 292 Pac. 250 (Mont.). Such will likewise be the ruling of this Court. See Locicero vs State, 14 Abs. 109.

Under the rule barring testimony of jurors to impeach their own verdict, it is nevertheless almost universally held that testimony of jurors, however, may be admitted to sustain the verdict and this procedure is resorted to most often when a prima facie showing of misconduct is first made; but in the present case, since the Court has ruled that the affidavit and testimony of the two jurors are inadmissible to impeach this verdict, the State's affidavits of thirteen jurors, seeking to sustain the verdict by showing no misconduct, are irrelevant. Consequently the defense objection to the admissibility of these affidavits will be sustained.

Next it is argued that the defendant did not have a trial by a fair and impartial jury as required by the constitution for the reason that juror Gillespie had a prior fixed opinion that the defendant was guilty and withheld disclosure of such opinion upon inquiry on voir dire. In support of this contention, reference

TEXT IS POOR

was made to the voir dire examination and the affidavit and oral testimony of prospective juror Osborne were offered and admitted in evidence. In the opinion of the Court, the contention of the defense is not supported in either respect. In the first place, questions put upon voir dire clearly indicated that the juror had discussed the case pro and con, that opinions on guilt or innocence had been expressed, and indicated he may have expressed such an opinion himself. He did, however, answer unequivocally that he had no opinion as to guilt or innocence as he was then questioned.

Osborne's affidavit is direct and positive and by its language certainly would tend to indicate a false answer on the part of Gillespie when inquired of on voir dire examination. The Court, however, recognizes, as well he must, that the affidavit is in the language of defense counsel and not necessarily in the language of the witness. Osborne's oral testimony regarding the same subject, on the other hand, is much less specific, somewhat equivocal, and indicates the possibility that whatever he heard may have been spoken by one of four in a group of prospective jurors, two of whom were excused upon challenge for cause because they held fixed opinions on either guilt or innocence.

Osborne was positive that some of the conversations he attributed to Gillespie took place on Wednesday, the third day of trial, whereas the minutes of the trial show that both were called into the Jury Box on Tuesday, the second day of trial, and Osborne

TEXT IS POOR

was then excused because he had a very definite opinion in opposition to capital punishment. Osborne admits that he had no direct conversation with Gillespie but claims the statements attributed to him were remarks that he overheard in a group conversation.

Gillespie categorically denied any such statements as attributed to him by Osborne and various others of the prospective jurors in company with Osborne and Gillespie in the assigned place for the meeting of the prospective jurors deny hearing any such statements from Gillespie. The Court fails to find under this state of the evidence that prospective juror Gillespie testified falsely upon voir dire and further holds that the defense has not sustained its burden of proof in this regard.

Prior to trial the defense filed a motion to suppress the evidence and therein demanded the return of the defendant's motor vehicle and any and all items taken therefrom. Upon hearing, the Court overruled this motion. Upon trial, the car itself was introduced as an exhibit and viewed by the jury and a seat cover from it likewise was introduced in evidence as well as expert testimony concerning blood spots found thereon.

Upon hearing on the Motion to Suppress it was developed that on Sunday, September 20th, shortly after noon the defendant was taken to the police station and questioned concerning this homicide. During the questioning, it developed that on the night

TEXT IS POOR

of September 14th or in the early morning hours of September 15th he had been with the victim in his car and at the scene where her body was found. The defendant was then placed under technical arrest and a charge was preferred in court against him that afternoon at about 4:00 P.M. Orders were issued by the Sheriff to seize the car. Between the time that the defendant was picked up at his home for questioning and the time when the officers found the car it had been driven from the driveway of defendant's residence where it was at the time the defendant was taken in custody to the residence of another person who called upon the Sheriff to remove it, although no claim is made that that is the reason for the car having been taken into custody by the Sheriff. It will be noted, however, that the taking of the car from the premises of this person in no way constituted a trespass upon the close of the defendant.

The main argument of the defense on the Motion to Suppress was bottomed on the theory that because the seizure was not commensurate with the arrest of the defendant in point of time and space, a subsequent seizure of it followed by a search of it without a search warrant violated the rights of the defendant guaranteed by the Fourth Amendment of the United States Constitution through the Fourteenth Amendment and also by Section 14 of Article I of the Ohio Constitution. In other words, the question is squarely put under these circumstances whether the seizure of the defendant's

TEXT IS POOR

car followed by a subsequent search of it violated his constitutional rights. Much reliance is placed by the defense on Preston vs United States, 376 US 364, 11 L. Ed. 2d 777, a late case by the United States Supreme Court decided March 23, 1964. In this case, the defendants were arrested on the street by city police officers for vagrancy and their car in which they were then seated was driven by a police officer to a police garage. Later on the car was searched and articles from it seized and turned over to federal authorities, which resulted in the defendants being tried for conspiracy to rob a federally insured bank. The court held that the search was not incident to the arrest and that the seizure of articles as a result of a search of the car was likewise illegal.

In Stoner vs California, 376 US 483, 11 L. Ed. 2d 856, another case strongly relied on by the defense, search of the defendant's hotel room in California two days before his arrest in Nevada on a charge of armed robbery, although the offense had been committed, was not an incident to a lawful arrest and hence the search and resulting seizure of property was illegal.

In these two cases the rule seemed to be laid down that a search can be incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest. In Stoner the court said, "The search was completely unrelated to the arrest both as to time and as to place." In Preston the court observed that the search was not undertaken

TEXT IS POOR

until the defendant and his companions had been arrested (for vagrancy) and taken in custody to the police station and the car had been towed to a garage. Hence at that point there was no danger that the men arrested could have used any weapons in the car or could have destroyed any evidence of a crime, even assuming that there are articles which can be the fruits or implements of the crime of vagrancy. The court also observed that since the car was already in custody there was no danger of its being moved out of the jurisdiction; and the court went on to say that the search was too remote in time and place to have been made as incidental to the arrest and held therefore that it was illegal.

This Court recognizes the austere authority of the United States Supreme Court to pronounce upon constitutional issues, but that is not to say that all that is pronounced by that court must always in so many words be literally followed. The ruling of the court must be read in the light of the facts of the case it was deciding. In Preston, as the court hinted, a motor vehicle could hardly be said to be an implement by which the offense of vagrancy could be committed, nor was there any reasonable or probable cause to indicate that the motor vehicle either itself would be or would produce any evidence of such offense. In Stoner a search of the defendant's hotel room was conducted two days before his arrest and in another state. Obviously the search was not incidental to an arrest and no probable cause or necessity for a search without a

TEXT IS POOR

warrant was shown.

In this Pruett case the officer had reasonable and probable cause to believe that the motor vehicle was an instrumentality used in connection with the crime of murder because of what the defendant himself had told him. Further, there was every reason to believe, therefore, that it might itself be or contain evidence of the crime, as in fact it did. Pruett was not under technical arrest until after he was questioned. In point of time, therefore, the seizure of the vehicle as closely as was possible was commensurate with his arrest. Under these circumstances, this Court holds that the seizure was incidental to the defendant's arrest. No one seriously doubts the right of officers to examine, inspect, and test in various ways any article of evidence after a lawful seizure of it. If an object used in connection with the crime being investigated can be seized without a trespass of which the defendant may rightfully complain, no search warrant is ever necessary. Thus the pistol with which a murder is committed, the engraving plates by which counterfeit money is printed, a motor vehicle which struck the hit skip traffic victim, goods which are the object of a larceny or burglary, may all be seized as evidence of the crime and without search warrant, so long as there is no trespass so far as the defendant is concerned.

Harris vs United States, 331 US 143, 91 L. Ed. 1399; United States vs Rabinowitz, 339 US 56, 94 L. Ed. 653; On Lee vs

TEXT IS POOR

United States, 343 US 747, 96 L. Ed. 1270; People vs Chaigles, 237 NY 193, 32 ALR 666 (Cardozo); State vs Hawkins 240 SW 2d 688 (Mo.) at 692, "Constitutional guarantees against unreasonable search and seizure apply where seizure is brought about by unlawful search. Those guarantees are not infringed where the recovery and possession of property theretofore stolen is accomplished without search and where such property lies fully disclosed, open to the eye, and in plain view." Hancock vs Commonwealth, 262 SW 2d 670 (Ky.); Bowles vs Misle, 64 Fed. Supp. 835 (DC Neb.); United States vs Yee Ngee How, 105 Fed. Supp. 517 (DC S.D.); State Theater vs Tri-States Theater Corporation, 11 FRD, 381 (DC Neb.).

The Fourth Amendment to the United States Constitution so far as here applicable provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue..."

Section 14 of Article I of the Bill of Rights of the Ohio Constitution so far as here applicable provides as follows: "The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue..."

Seizure of an implement of crime is not an unreasonable seizure in and of itself under all circumstances. Cases are myriad which hold that only the unreasonable seizure is within the

TEXT IS POOR

constitutional prohibition. In the opinion of this Court, the seizure of the defendant's motor vehicle was reasonable under the circumstances disclosed and certainly the search for it was not unreasonable.

Nowhere is it written that a seizure of evidence of a crime is prohibited except as that seizure may be the result of an unreasonable search. Here there was no unreasonable search for the car any more than if a homicide had been with a .38 and a search of the fields and byways was conducted for it. To complete the example, however, a search of the defendant's house for the .38 would require a search warrant unless the search was incidental to a lawful arrest. In either example, the object of the search is the .38. In either instance, a seizure of it may be made because it is an object of evidence of crime; but in the second example, a search warrant or its equivalent, i.e. a timely accompanying arrest, is necessary not because the defendant is to be protected in hiding or keeping the evidence but because his home shall not be violated by such a trespass.

TEXT IS POOR

Complaint is made that the verdict of the jury is not sustained by sufficient evidence and is contrary to law. A brief reference here concerning the evidence in the case is necessary. Without attempting to set forth in any detail the voluminous evidence that was presented, it is deemed sufficient for the purposes of this motion to point out that the following principal evidentiary facts, in the opinion of the Court, are established by credible evidence in the record to the extent that the jury would be justified in so concluding; and, therefore, for the purposes of decision on this motion only, may be said to be conceded to be true in the sense that the jury could have and did so find. The injuries suffered by Susan Osborne, which caused her death, are of such a nature as to conclusively carry the inference that someone purposely killed her. The purpose to kill would almost necessarily have to be concluded from the very nature of the injuries inflicted and in argument this fact seems even to be conceded by defense counsel.

The defendant was the last person known to have been with Susan Osborne prior to her death and this fact may well be drawn from the defendant's own testimony on the witness stand and from the testimony of Detective Roach and Norman Balcomb. The defendant was at the murder scene with Susan Osborne in his car. This fact can well be determined from the testimony of Detective Roach. The defendant and his wife concocted a false story concerning the disappearance of Susan Osborne when they told Ann Shackle and the

TEXT IS POOR

Conneaut police that "they had let Susan out in Conneaut at Kerner's Drug Store about midnight before they took Balcomb to Ashtabula," although the defendant and his wife obviously knew that the Conneaut police officers had a missing person report regarding Susan and were inquiring as to her whereabouts.

The defendant did not reveal to the Conneaut police what he later claimed was the true story about the disappearance of the deceased, namely, that she had jumped out of his car at the traffic light at 24th and Lake Avenue. The defendant apparently started the return trip to Conneaut by way of Lake Avenue and Lake Road, but contended that he eventually returned via Route 20. He contended upon trial that he originally started back by way of Lake Road because he was to some extent under the influence of alcohol and wanted to avoid running into police as much as possible, but the jury might well have concluded that there was another reason, namely, to have sexual relations with the victim, as indicated to some extent from his declarations to Balcomb and Ann Shackle made earlier in the evening respecting a desire to "switch partners" (obviously referring to his own wife and the deceased) and that he was "going out with Susan" as claimed to have been related to him by Ann Shackle.

In attempting to determine the legal sufficiency of the evidence, the Court has chosen to break down the problem into two parts, i.e., 1) Is the evidence legally sufficient to warrant the

TEXT IS POOR

this story of the victim's disappearance, which from the standpoint of an analysis of the sufficiency of the evidence is to totally gainsay the defendant's contention that the falsehood was the manufactured product of the other person.

That the above recited facts are circumstantial evidence is not to be denied logically, but raise the question as to whether the jury may infer from them that the defendant purposely killed the victim. Are these facts consistent with his guilt and inconsistent with his innocence?

Suppression, or fabrication, or attempts to fabricate, or to procure false evidence, or to destroy evidence, are said to be always admissible against a defendant on the theory of showing of consciousness of guilt, which is in the nature of an admission on the theory that it is not to be supposed that an innocent person would feel the necessity therefor. This is practically the universal rule and there is almost a total dearth of authority to the contrary. Literally hundreds of cases are reported in the digests on the subject but obviously only a few are referred to in this opinion. See 20 Am. Jur. para. 289; State vs Smith, 194 SW 2d 905 (Mo.); State vs Christian, 245 SW 2d 895 (Mo.).

Evidence of this caliber is said to be cogent evidence of guilt. See Harris vs U.S., 169 Fed. 2d 887; Harvey vs U.S. 215 Fed. 2d 330; State vs Broadhurst, 196 Pac. 2d 407 (Ore.); State vs Thompson, 24 NW 2d 10 (S.D.); Commonwealth vs Snell, 75 NE 75 (Mass.).

TEXT IS POOR

False statements made by the defendant apparently for the purpose of misleading investigating officers and warding off suspicion are admissible against him and are said to be strong indications of guilt. People vs Rumley, 222 Pac. 2d 913 (Cal.); People vs Porter, 223 Pac. 2d 102 (Cal.); Commonwealth vs Bonomi, 142 NE 2d 140 (Mass.).

Exculpatory statements made on interrogation with intent to divert suspicion or mislead police when shown to be false are circumstantial evidence of guilty consciousness and have independent probative force. United States vs Anthony, 145 Fed. Supp. 323. It is said that such statements are in the nature of substantive evidence in and of themselves. See State vs Redfern, 98 SE 2d 322 (N.C.); Commonwealth vs Kiefaber, 179 Atlantic 2d 262 (Pa.); People vs Jordan, 22 Cal. Reptr. 731; Bennett vs State, 377 Pac. 2d 634 (Wyo.).

In Ohio, as elsewhere, flight following commission of a crime has long been regarded as evidence of guilt unless satisfactorily explained because it tends to show a consciousness of guilt or a guilty connection with the crime. Ohio stands strongly committed to the "consciousness of guilt" theory as being a circumstance from which guilt may be inferred along with other circumstances and facts, and this Court can see no good reason why the rule promulgated by almost all the cases outside of Ohio dealing with the subject matter of suppression of facts and false

TEXT IS poor

statements to throw off suspicion as set forth by the cases outlined above should not be applicable in Ohio, although the cases directly in point in this state are very limited in number. See State vs Viola, 51 Abs. 577; Grimo vs State, 6 OCD 90; State vs Grambo, 82 App. 473; Sinatra vs State, 17 Abs. 481.

In State vs Schaeffer, 96 OS 216, an automobile manslaughter case in which the defendant claimed he did not know he had struck the deceased but was cross examined concerning his failure to report the matter after he learned the deceased had been struck, the following language appears on page 222 of the opinion: "It has always been held admissible to show the conduct of the accused immediately after the time he is charged with having committed an offense for the purpose of showing innocent or guilty conduct as the case may be." In Mefford vs State, 13 App. 106 at pg. 107, the court said: "Attempts to suppress evidence indicate a consciousness of guilt and if proved to have been made by defendant are highly probative of criminality." The same rule was recognized in Richards vs State, 43 App. 212, at pg. 221. The Supreme Court in Cleveland vs McNea, 158 OS 138, at pg. 142 said as follows: "The destruction and suppression of adverse evidence constitute a prejudicial circumstance of much weight as does also the fabrication of a false defense."

In the case at Bar, the defendant and his wife testified to the giving of the false explanation, but claimed Balcomb was the

originator of the idea and that they told it in order not to put Balcomb in an embarrassing position with his wife. Balcomb, on the other hand, testified that the idea was urged upon him by the defendant and his wife to protect the defendant against possible dismissal from the Manpower Training School.

The jury found against the defendant on this issue and likewise thereby found this evidence to be some proof of the principal fact charged against the defendant. In this, the jury was justified according to all the authorities.

The next issue to be determined is whether or not the evidence is legally sufficient to warrant the finding of the jury that the defendant killed Susan Osborne while committing rape or attempting to commit rape upon her. This, of course, is an essential material fact to be found by the jury and sustained by the proof in order to sustain the verdict of murder in the first degree.

The evidentiary facts heretofore recounted and the proper inferences to be drawn therefrom must be kept in mind. In addition thereto, the following facts and the reasonable inferences which may be drawn therefrom must be taken into consideration. The completely nude body of Susan Osborne was found flat on the back with the legs spread. A small superficial stab wound in the upper left chest corresponded in position with a small cut in her blouse. A large quantity of blood appeared on both the blouse and her brassiere. Her clothes were not torn and seemingly were

placed in a pile near her feet, with the exception of her jacket which was under her buttocks. Blood of the same type as the deceased's was found on the seat cover of the defendant's car. There was no evidence of a struggle on the ground. Detective Roach testified that the defendant told him that at the scene he "made a couple of passes" at the deceased and that she got out of the car and he followed out the same door. The medical testimony of the state tended to sustain the theory of sexual intercourse.

Acknowledging that this evidence is circumstantial in character, does it point toward and is it consistent with the State's theory of rape or attempt to commit rape?

The elements of the offense of rape or the attempt to commit it, like the element of purposeful killing, may be established by circumstantial evidence in cases of homicide. People vs Lindley, 161 Pac. 2d 227 (Cal.); MacAvoy vs State, 15 NW 2d 45 (Neb.); Hill vs State, 39 SE 2d 675 (Ga.); State vs Folk, 277 Pac. 2d 1016 (Ariz.); People vs Reed, 240 Pac.2d 590 (Cal.); People vs Moore, 310 Pac. 2d 969 (Cal.); People vs Doherty, 193 NE 2d 37 (Ill.); Lipscomb vs State, 165 Atlantic 2d 918 (Md.); People vs Griffin, 32 Cal. Reptr. 24; Black vs State, 222 SW 2d 816 (Ark.); People vs Lawrance, 259 Pac. 2d, 439 (Cal.); People vs Harris, 118 NE 2d 470, 306 N.Y. 345 (128 N.Y. Supp. 2d).

This is but in recognition of the well established principle that in the absence of statutory enactment to the contrary, whatever

may be established by direct evidence in a criminal case also may be established by circumstantial evidence. 20 Am. Jur. 261, para. 273.

Before proceeding further, it is well to keep in mind, in an effort to keep the thinking straight, that the evidence tends strongly to maintain the theory that the beating resulting in the death of the deceased and the rape or attempt to commit rape, if there were either, all occurred at the scene where the deceased's body was found. Whether the beating occurred before, during, or after the rape or attempted rape makes no difference. It was part of the res gestae of the crime and if done pursuant to that felonious intent or even after technical completion of such felony, if that be the fact, it nevertheless would result in murder in the first degree. See Conrad vs State, 75 OS 52; State vs Habig, 106 OS 151; Callahan vs State, 201 NE 2d 338 (Ind.); Commonwealth vs Almeida, 68 Atlantic 2d 595 (Pa.); 12 ALR 2d 183.

Reference next is made to some of the Ohio cases dealing with homicide in the commission of some other felony on the point of the weight and sufficiency of the evidence. In Turner vs State, 21 Abs. 276, it was held that where only a belief in the truth of the defendant's story would justify a verdict other than guilty of first degree homicide, such a verdict was not against the weight of the evidence. Without saying so in so many words practically the same result was reached in Dull vs State, 36 App. 195,

a case of homicide during a robbery when the real issue on the weight of the evidence turned on the acceptance or rejection by the jury of a statement claimed by the officer to have been made by a defendant, but which he denied on the witness stand.

In State vs Rogers, 64 App. 39 (our own court), a case of homicide during perpetration of a robbery, the defendant did not participate in the actual shooting but was behind the wheel of the automobile parked a short distance away from the scene. There was a conflict in the evidence as to whether the conspiracy of the three original defendants (separate trials had been granted) was to rob or simply to steal a case of milk. Obviously in the latter instance, because larceny is not one of the felonies mentioned in the statute, there could be no conviction of murder in the first degree, and the verdict ~~sh~~ then would be both contrary to the weight of the evidence and contrary to law. The evidence was held sufficient to permit the jury to draw the inference of perpetration of robbery.

In Schneider vs State, 1 OCD 565, the ultimate facts that 1) the defendant killed his mother, and 2) in perpetrating a robbery of her, were upheld on the basis of circumstantial evidence only. Blythe vs State, 2 OCD 636, is another case of similar import. Both of these cases decided by the Hamilton Circuit Court and both affirmed by the Supreme Court point out the right of the jury to reject the story or explanation of the defendant when the

surrounding circumstances in any way reasonably seem to justify such rejection.

The following are analysis of and excerpts from some of the cases cited supra on homicide rape convictions. In People vs Lindley, 161 Pac. 2d 227, the victim, a thirteen year old girl, was found beaten but was still alive lying in some bushes. She died about an hour later. Her clothes were torn, there were vaginal bruises. She had been seen fighting with the defendant. Another prisoner claimed the defendant had admitted grabbing and choking the victim, which fact was denied vehemently by the defendant, but he was shown to have been in the vicinity and to have had the opportunity to attack and leave the victim where she was found. The jury found him guilty of homicide in attempt to commit a rape. From the opinion, page 233—"If the evidence establishes conclusively that the murder was so committed then only a verdict of murder in the first degree may properly be rendered and even where the showing is not conclusive, if the record affords substantial support for the conclusion that one of the enumerated felonies was perpetrated or attempted and the killing was committed in such perpetration or attempt, the judgment must be affirmed (cases cited)... After conviction all intendments are in favor of the judgment and a verdict will not be set aside unless the record clearly shows that upon no hypothesis whatsoever is there sufficient substantial evidence to support it. (cases)... Unquestionably the

jury reasonably could have drawn from the evidence the inference that the girl was killed in the perpetration or attempted perpetration of rape... the girl's physical condition, the marks on her body coupled with all the other evidence amply support the conclusion that death resulted from injuries sustained either in a rape or attempted rape committed by Lindley... under such circumstances the absence of independent proof of premeditation or deliberation is immaterial. The jury, once satisfied that a rape was perpetrated or attempted and that Lindley was the assailant, had no alternative but to return a verdict of murder in the first degree."

People vs Reed, 240 Pac. 2d 590, from page 595, "It is not the province of this court to determine conflicts in the evidence nor to choose between different inferences which reasonably may be drawn from the testimony. The sole question so far as the admissible evidence is concerned relates to its sufficiency to support the verdict. The ultimate fact found by the trial court (jury) was that the defendant was guilty of murder in the first degree. If there is substantial evidence in the record to support that judgment, the determination must be upheld. (cases cited)... Applying this rule to the record in this case and conceding that the prosecution is limited to the theory of murder committed in perpetration of rape, it cannot be said that 'upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below'... The victim was found dead as a result of

TEXT IS POOR

violence. There is evidence tending to prove that sexual intercourse had been accomplished. The jury was not required to conjecture that the intercourse had been with consent. A reasonable inference to be drawn from the evidence is that (the victim) offered resistance and was raped... Considering the entire testimony, it amply supports the implied finding of the jury that Reed killed the victim in the perpetration of rape."

See the following language from People vs Harris, supra, at pg. 473 of the opinion, "It is of course conceivable that after defendant left the girl in the hallway someone else came upon her and strangled her, but that is a possibility merely of the same kind present in many another affirmed criminal case. The question of law is not whether someone else may possibly have strangled her... it is whether the proof points logically to the defendant's guilt and excludes to a moral certainty every other reasonable hypothesis, that is, whether the proven facts are consistent with and point to defendant's guilt and are inconsistent with his innocence. (cases cited.)... We see no break here in the chain of evidence which points to the defendant and to no one else, unless we are to demand absolute or metaphysical certainty in which event there never could be a conviction on circumstantial evidence alone. This proof meets the established test, likewise as to whether the killing was done while a rape or attempt to rape was being committed. That there was a rape or attempt is fairly inferrable from this proof:

TEXT IS POOR

defendant's threat, his tussle with the girl, her torn underclothes, her drunken condition, his statement that she fell to the floor before the intercourse. The Trial Court in his charge authorized the jury to find either rape by force or fear or because of intoxication preventing resistance. We think the proof justified such instructions... There was a tussle, there was resistance, the victim's clothes were torn open, there was intercourse, she was strangled to death."

It is not the separate links in the chain of circumstantial evidence which are looked to separately to determine the legal sufficiency of the evidence, but rather whether when taken as a whole these links make a case which cannot be reconciled upon the hypothesis of innocence. See State vs Butler, 43 Op. 321. It seems to this Court that the rule with reference to the quantum of evidence of a circumstantial nature which will be held legally sufficient to uphold a conviction is oftimes repeated but seldom carefully enough analyzed. As this Court sees it, the issue is whether or not any one link or any one set of circumstances in the total chain of evidence relied upon to support the conviction, of itself will support an inference only of innocence rather than of guilt. In such a case the total chain of evidence is legally insufficient. Such an example is State vs Domer, 1 OA 2d 155, Ohio Bar, Feb. 1, 1965, a case cited in argument by the defense.

One of the points passed upon by the Court of Appeals was

TEXT IS POOR

the sufficiency of the evidence of a circumstantial nature concerning in what manner the deceased met his death. A necessary element in the State's case was to prove that the victim was alive prior to the time the defendant poured gasoline over him and the motor vehicle and set them afire. The expert testimony showed there was no trace of carbon monoxide in the victim's blood. The conclusion of the experts was that this proved that the victim was dead at the time the fire was started. On this point the court in its opinion said, "Certainly when considering the state of the record on the question of whether Riddle was alive when the fire was started, as claimed by the State, with the many other factors developed in the record challenging such conclusion, it cannot be said that the State has shown defendant caused the death of Riddle by incineration beyond a reasonable doubt..."

In making an analysis of the evidence in seeking a correct determination of this difficult problem, it seems to me that the Court should attempt to analyze those facts which the jury were justified in finding from the evidence produced and then to determine from those chief evidentiary facts in the chain of circumstantial evidence whether they as a whole point unerringly to the guilt of the defendant and cannot be reconciled with the theory of his innocence. If that be the analysis, the verdict may stand; if not, the verdict must fall. (See dissenting opinion of Taft in State vs Sheppard, 165 OS 306.)

TEXT IS POOR

From the evidence in this case the jury could have found the following principal evidentiary facts, namely: that the defendant said he was going out with the deceased; that he wanted to have intercourse with her; that he was the last known person with her; that he was at the scene with her where her body was found; that the deceased was murdered at this scene; that sexual intercourse with the deceased had been had at the scene by someone, either forcibly or under threat, or if intercourse were not actually consummated, then at least that there was an attempt at it; that the defendant falsely stated the whereabouts of the deceased as he knew them to be when she was missing and being sought; that the defendant on the stand falsely attributed this deceptive explanation to another person. Do these facts and circumstances taken as a whole support the inference of the defendant's guilt and do they exclude every reasonable hypothesis except that of the defendant's guilt?

These facts and circumstances are all consistent with each other, each is independently proved, none is inconsistent with the guilt of the defendant, and all of them when taken together are consistent with the defendant's guilt and point unerringly to the defendant and to no one else.

In contravention of the argument that to permit the drawing of such conclusions or inferences is but piling one inference upon another, rather in the opinion of the Court it is a question of

TEXT IS POOR

permissible and logical parallel inferences that may be drawn from otherwise proved evidentiary facts. Such is not a violation of the inference upon inference rule. See State vs Martin, 164 OS 54; McDougall vs Glenn Cartage Company, 169 OS 522.

The jury as the tryer of the facts must determine the truth or falsity of an asserted secondary fact from which an inference or primary fact is to be drawn in the chain or cable of circumstantial evidence. It is the duty of the Court to pronounce as a matter of law whether the inference may be drawn. It is the function of the jury to say whether or not it will be drawn. If the inference is a logical and permissible one, the Court shall permit it. Then if the jury concludes the inference, it in turn becomes an evidentiary fact. If the evidentiary facts, whether they be the product of direct evidence or circumstantial evidence or both, convince the jury beyond a reasonable doubt of the defendant's guilt, then barring error or indication of passion or prejudice, the verdict should be upheld. It is not the Court but the jury that must be and by its verdict of guilty says that it is satisfied of the defendant's guilt beyond a reasonable doubt.

From the previously recited evidentiary facts, the Court holds that logical and legally permissible inferences may be drawn that there was either a rape or an attempt to commit rape, that there was an intentional killing during the pursuit of such felonious intent, that the defendant was the person responsible

TEXT 15 POOR

therefor. The jury in this case so inferred or concluded and by its verdict has said it is so satisfied beyond reasonable doubt. Individually each member of the jury so spoke upon poll of the jury in open court. This Court cannot say that the jury ought not to so have found or that it should have returned a verdict of not guilty of murder in the first degree but guilty of murder in the second degree or of manslaughter, even if the Court were it the tryer of the facts and might possibly have concluded otherwise. As the Supreme Court of Ohio in the recent case of State vs Antill, 176 OS 61 said, "When from the evidence reasonable minds can reach different conclusions on the issue of whether or not the defendant is guilty beyond a reasonable doubt, the case is one for the determination by the jury."

The Court finds no error prejudicial to the rights of the defendant. The Motion for New Trial will be overruled with exceptions noted.

ROLAND PONTIUS, JUDGE.

March 27, 1965.

TEXT 15 pages

STATE OF OHIO, ASHTABULA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
PLAINTIFF-APPELLEE,	)	OPINION
-vs-	)	Case No. 598
ROBERT LeROY PRUETT,	)	
DEFENDANT-APPELLANT.	)	

APPEARANCES.

Joseph E. Mahoney, Prosecuting Attorney, Jefferson, Ohio, for Plaintiff-Appellee.

Nazor & Nazor, Ashtabula, Ohio, for Defendant-Appellant.

Hon. Nils P. Johnson,
Hon. George M. Jones,
Hon. John J. Lynch, JJ.

Dated: February 6, 1967

Grace Marten,
Court of Appeals Reporter,
Mahoning County Courthouse,
Youngstown, Ohio.

TEXT IS POOR

Appellant, Robert Leroy Pruett, hereinafter referred to as defendant, was indicted by the Grand Jury of Ashtabula County (September 1964 term), for first degree murder for the killing of Susan Osborne while in the commission of rape. The indictment was brought under and by virtue of R. C. 2901.01. During the course of the jury trial the Court permitted the prosecutor to amend the indictment by interlineating after the words "in the perpetration of rape" the words "or attempting to perpetrate a rape". This was done pursuant to Revised Code Section 2941.30.

The case came on for trial February 1, 1965. It was concluded on February 23, 1965. The jury returned a verdict of guilty of murder in the first degree without a recommendation of mercy.

Motion for new trial was duly filed, argued and overruled. The sentence and judgment is now before this Court for review. Execution of the sentence has been suspended, and defendant is in the Ohio Penitentiary pending disposition of his appeal.

It appears from the evidence that Pruett, a married man, lived in Conneaut, Ohio, at the time of the crime. The Pruetts had no children at the time, but there was some indication that Mrs. Pruett was pregnant. Pruett

TEXT IS POOR

was attending the Manpower Training School in Ashtabula, but was otherwise unemployed. Shortly prior to September 5, 1964, defendant first met Susan Osborne, who was then seventeen years of age, single, and who lived with her mother in Conneaut. On the night of September 14, 1964, the defendant, a friend named Balcom, and defendant's wife made the rounds of a few beer gardens. While on these rounds, they met Susan Osborne. Eventually, about midnight, defendant took his wife home and then took Balcom home to Ashtabula. Susan Osborne accompanied Balcom and Pruett from Conneaut to Ashtabula. Balcom was dropped off in his neighborhood in Ashtabula, and Pruett headed out with Susan Osborne in the Ford auto being used by Pruett that evening. This was the last time that anyone, other than Pruett, saw Susan alive. This was in the early hours of September 15, 1964. The only testimony available as to what happened to Susan is Pruett's. Pruett claimed at the trial that the two had an argument while seated in the auto and waiting for a light to change on Lake Avenue in Ashtabula; that Susan opened the door and got out of the car; that due to the traffic standing behind him he drove on and lost track of Susan; that he could not successfully follow her; that he drove around a bit looking for Susan, did not find her, and that he then headed for home in Conneaut, arriving there about 1:30 a.m.

On Saturday, September 19, 1964, Susan Osborne's

TEXT IS POOR

nude body was found in some weeds lying about one hundred feet from Lake Road in Ashtabula Township, in an area which can be reached by a lane leading south off Lake Road. The victim had a puncture wound in the chest and had been brutally beaten about the face and neck.

Defendant has made twenty assignments of error. Counsel specifically argued ten of the errors assigned, without abandoning the others, but claiming that some counts overlap in the assignment.

Defendant first claims irregularity in the proceedings of the trial court, (1) in permitting an amendment to the indictment, and (2) an abuse of discretion on the part of the trial court in refusing to grant defendant's request for a separation of witnesses at the hearing on the motion for a new trial.

First, as to the amendment to the indictment, defendant claims an additional charge, a new crime, has been added to the indictment. It can hardly be said that there has been a change in the identity of the crime. This is so irrespective of the fact that defendant claims that an actual rape had not been proved. Revised Code Section 2941.30 grants a trial court authority to permit an amendment to an indictment in form or substance, provided only that there are no changes in the name or identity of the crime.

Revised Code Section 2941.30, provides in part:-

TEXT IS POOR

"The court may at any time before, during or after a trial amend the indictment, information, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged. * * *."

After close study we find no change in the name or identity of the crime. This assignment is not well taken. (See Bryant v. State of Ohio, 48 Ohio App. 208, and State v. Holt, 59 Ohio App. 309. The trial judge in the Bryant case had the same problem with murder and robbery, and permitted the change to "while attempting to commit a robbery").

As to the second contended irregularity, we are of the opinion that the trial judge did not abuse his discretion in not ordering a separation of witnesses during the hearing for a new trial. We hold this after a careful review of the testimony. The witnesses were jurors, some of whom had sat on the case and others who were on the venire but had been dismissed. Defendant contended at the hearing that there had been misconduct on the part of one of the jurors in response to a question put to that juror during voir dire. The judge properly considered the nature of the changes and rightfully permitted the juror-witnesses to be present at the hearing.

Defendant next assigned as error the prejudicial admission into evidence the testimony of officer Roach.

TEXT 15 pgs

This, he claims, denied him the protection afforded him by the Constitution of Ohio and the Constitution of the United States with amendments. The facts giving rise to this issue do not seem to be in dispute. However, there is a disagreement between counsel for defendant and the trial court as to the applicability of some recent United States Supreme Court decisions and at least one Ohio Supreme Court decision to these facts. The police authorities learned from Balcom that Pruett had been with Susan Osborne, and apparently was the last to see Susan alive, on September 15th. Detective Roach of the Sheriff's Department testified at the trial that he had gone to Pruett's house on the 20th and had found Pruett home. Roach was accompanied by some other officers. Pruett was asked to go with the officers to the Ashtabula City Police Department. Pruett went voluntarily. Not much else was said at the Pruett house or on the way to the station. At the station, the group went to the basement, and then Pruett was taken into the police locker room by Roach. Roach then told Pruett that he knew that Pruett had been in the company of Susan Osborne on the 14th and 15th, that Susan Osborne had met with death, and that the crime was terrible. He asked Pruett if he wanted to talk, but said "that he didn't have to say anything to me until he got an attorney and he could call whoever he wanted for help." Following this Roach testified that Pruett told him that he had taken the girl to the place where the body was

TEXT 15 poor

found. Pruett then said several times "I didn't do it". There followed some disputed testimony as to the conversation between Pruett and Officer Roach in the Ashtabula City Police Station. At least the defendant and the state do agree that Roach did discuss with Pruett degrees of murder and punishments. This has led counsel for defendant to point out that an arrest had been made under the Henry Rule (Henry v. U. S., 4 L. Ed. (2d) 136). "An arrest is made the moment a man's movements are restricted and not when a formal arrest is made". Defendant argues that Pruett's movements had been restricted prior to this point, and, according to the Escobedo Rule (Escobedo v. Illinois, 378 U.S. 478), the process had shifted from being investigatory to being accusatory, and since the adversary system was then in process, the accused had to be afforded the right to consult with counsel. The facts clearly show that under the Henry Rule, Pruett had not been under technical arrest or otherwise. His movements had not been restricted, according to his own testimony. Escobedo is not applicable as Detective Roach advised Pruett that he could have an attorney, and Pruett could remain silent until then. Also, we distinguish Alexander v. Green, 2 Ohio St. (2nd) 231. The Green case turns on an arrest; Wong Sun (Wong Sun v. U. S., 371 U. S. 471) and the subsequent line of cases are distinguishable upon the facts. We are not involved with a verbal confession following an

TEXT 15 poor

unlawful arrest.

In the instant case there was no confession. Officer Roach was investigating a murder and was talking to Pruett, whom Blacom had last seen with the victim. Pruett's movements were not restricted, by his own testimony. The courts are merely trying to do away with improper police work and investigation that results in the deprivation of constitutional guarantees. They are not eliminating all investigation. The guide lines are most restrictive but not an abolition of all investigations. We conclude that the police work in this case must be commended.

The defendant raises as error the seizure and search of the Ford auto used by the Pruetts, Balcom and Susan Osborne. The trial court held that the seizure of the auto was valid as a seizure of an "instrumentality used in the commission of the crime". We concur with the trial court's reasoning, found beginning on page 151 of Volume 1 of the Bill of Exceptions. There is no need for further discussion on this point. This assignment of error is not well taken. (See also Hemmis v. State, 129 N. W. (2d) 209). Furthermore, the record indicates to this Court's satisfaction that the vehicle was seized incidental to a lawful arrest and, therefore, no search warrant was needed.

The twelfth assignment of error states that the verdict is not sustained by sufficient evidence; that the

TEXT IS POOR

court shall consider in this assignment whether or not the evidence shown the defendant guilty of first degree murder as found by the jury, and if not, whether the evidence supports a finding of guilty of a lesser degree, or of a lesser crime included in the charge. We have done as requested. This error, along with the others, has required hours of reading, re-reading and thought. So it is not lightly that we hold that there is sufficient evidence on each element of the crime to support a guilty verdict. A recounting of over 1,300 pages of testimony to support this finding is unwarranted. We conclude that the evidence was sufficient and proper to support the verdict of the jury. We urge the reading of the trial court's splendid, learned and detailed opinion, dated March 27, 1965. It is excellently done and most thorough. It was great help to this court, and will be to other reviewing courts.

All of the errors assigned have been considered. Defendant had the finest professional representation. We commend Attorneys Howard and Gordon Nazor. Defendant had a fair trial as constitutionally guaranteed to him. Thus, finding no error in the record prejudicial to the appellant, we must affirm the judgment and sentence of the trial court.

Judgment affirmed.

Johnson, P. J., Concurs.
Lynch, J., Concurs. See concurring opinion.

APPROVED:

GEORGE M. JONES
JUDGE.

TEXT IS POOR

LYNCH, J., CONCURRING.

I concur in the majority opinion; however, this case presents a difficult constitutional question on search and seizure which I will discuss in detail.

In this case the evidence admitted into the trial of the case is sufficient to establish the guilt of defendant. However, the assignments of error of defendant that present the most difficulty in deciding this appeal is whether certain crucial matters admitted as evidence in this case were inadmissible as violating the constitutional rights of defendant because of recent United States Supreme Court decisions. If the admission into evidence of such matters violated the constitutional rights of defendant, the conviction of defendant must be reversed.

The assignment of error which I will discuss is 6(B), which is as follows: Was the motor vehicle of the defendant-appellant illegally searched and seized, no search warrant for same having been issued, and the seizure and search not being contemporaneous as to time and place with the arrest of the defendant?

The body of the victim was found on Saturday, September 19, 1964. The next day, which was a Sunday, Detective Sergeant Harold S. Roach of the Ashtabula County Sheriff's Department in the course of his investigation of this crime, asked the defendant to come to the Ashtabula

TEXT IS POOR

City Police Department for interrogation, and defendant went voluntarily. Officer Roach testified that during the course of the interrogation, which occurred shortly before noon, defendant admitted driving the victim to the scene of the crime in defendant's automobile, that he "made a couple of passes at her and she got out of the passenger side of the car", that defendant got out the same side and "an argument started", but that defendant said repeatedly "I didn't do it". (R. 448-449).

Officer Roach then placed defendant under arrest and took him to Jefferson, the county seat of Ashtabula County. Sheriff Tom Fasula was present when officer Roach and the defendant arrived at the County Jail, and Officer Roach discussed his interrogation of defendant with Sheriff Fasula. Sheriff Fasula then ordered defendant's automobile impounded. A deputy sheriff called Marrison Motors to go to Ashtabula to pick up defendant's car about 3:00 p.m. Defendant's car was located parked in the rear of the residence at 621 W. 38th Street, Ashtabula, Ohio. It was picked up by John W. Marrison pursuant to the order from Sheriff Fasula, and was taken to Marrison's garage.

On the following day, which was September 21, 1964, Officer Roach examined defendant's automobile at Marrison's garage and noticed a discoloration on the front seat. Officer Roach removed the part of the front seat upon which this discoloration was located (R. 485-487). This was sent to the Federal Bureau of Investigation Laboratory

TEXT IS PAGE 15

which determined that the stain on defendant's front seat cover was human blood belonging to Group B, which was the same as the victim (R. 570). Officer Roach also found a stain on the grill of defendant's car, which was determined by the Federal Bureau of Investigation Laboratory to be human blood, but there was not enough blood within the smear to determine the type (R. 491, 569).

This issue, then, is whether, under the facts of this case, the seizure and search of defendant's automobile without a search warrant violated defendant's constitutional rights guaranteed under the Fourth Amendment of the United States Constitution and under Section 14 of Article I of the Ohio Constitution. Specifically, was the seizure and search of defendant's automobile without a search warrant "an unreasonable search and seizure" as prohibited by these constitutional provisions.

This writer has had five years experience in law enforcement as a special agent with the Federal Bureau of Investigation and as special agent with the Counter-Intelligence Corps of the United States Army. From his experience, this writer knows that the law enforcement officers did in this case what has been generally accepted in law enforcement circles as legally permissible for a great many years. However, the United States Supreme Court has ruled that certain procedures of state law enforcement officers concerning search and seizure violated the constitutional

TEXT IS NOT

rights of the accused, and have prohibited the use of evidence produced as a result of such illegal search and seizure; therefore, existing law enforcement procedures in the investigation of crime and the detection of the perpetrators of crime must be examined in the light of these decisions.

It has been generally accepted by law enforcement officers that when a crime has been committed, law enforcement officers have the right and duty to conduct an investigation at the scene of the crime without the necessity of a search warrant, and that this investigation includes a reasonable search of the vicinity of the scene of the crime and the seizure of any evidence that would establish the nature of the crime and the identity of the person who committed the crime.

When a lawful arrest is made at the scene of the crime, it is clear that the law enforcement officers have the right to conduct a search at the scene of the crime and to seize incriminating articles connected with the crime without a search warrant. 47 American Jurisprudence 515, Searches and Seizures, Section 19.

However, when the person who committed the crime has left the scene of the crime when the law enforcement officials have arrived, does the law require a search warrant for the law enforcement officials to investigate the scene of the crime in order for such law enforcement

TEXT IS POOR

officers to seize any incriminating article connected with the crime that is within the reasonable vicinity of the scene of the crime?

It would seem that this issue would have been decided by many courts, but this writer has not been able to find any decided case directly in point.

I would hold that when a law enforcement officer has reasonable cause to believe that a felony has been committed, he has the right and duty to investigate the scene of the crime without the necessity of a search warrant; that this investigation includes a reasonable search of the vicinity of the scene of the crime and the seizure of any incriminating articles connected with the crime, and that such a search and seizure does not violate the provisions of the Fourth Amendment of the United States Constitution and Section 14 of Article I of the Ohio Constitution.

The guaranty set out in the various constitutional provisions against search and seizure is designed to prevent violations of private security of person and property and unlawful invasions of the sanctity of the home of the citizens by officers of the law. 47 American Jurisprudence 507, Searches and Seizures, Section 10.

However, when a crime has been committed, a public law has been violated, and there is a public interest in the investigation of the crime and the determination of the identity of the person who perpetrated the crime.

TEXT IS POOR

One of the first steps in the investigation of a crime is an examination of the scene of the crime. The writer is unaware of any law enforcement agency that obtains a search warrant as a routine procedure to investigate the scene of a crime. Investigations by law enforcement officers at the scene of a crime without a search warrant have occurred innumerable times in the past and are continuing at the present time. Apparently, this procedure has been generally accepted, because this writer has found no decided case that challenges the search and seizure of evidence in the vicinity of the scene of the crime as an unreasonable search and seizure within the prohibitions of the various constitutional provisions.

It is submitted that the guaranty set out in the constitutional provisions against search and seizure is to protect the general public against invasion of privacy by law enforcement officers, and that these constitutional provisions were never intended to protect those who violate the laws from being prosecuted. The constitutional standard of a search and seizure is "unreasonableness". I would hold that when a crime is committed, the search of the vicinity of the scene of the crime by a law enforcement officer without a warrant is reasonable. It is submitted that to require a search warrant for every such search would not only be unreasonable but an unrealistic and unnecessary burden on effective law enforcement.

TEXT IS RUN

In the instant case, there is no issue as to the investigation by the law enforcement officers at the scene of the crime. The problem arises, because the law enforcement officers had reasonable cause to believe that defendant's automobile was used to transport the victim to the scene of the crime, and that the chain of events that directly led to the murder of the victim commenced within defendant's automobile.

If defendant's automobile was left parked at the scene of the crime, defendant would have difficulty to question the right of law enforcement officers to search and to seize it. If this was the situation, I would hold that the law enforcement officers would have the legal right to search and to seize defendant's automobile without a search warrant.

However, defendant had moved his automobile from the scene of the crime. Does this fact create any additional constitutional restriction to its search and seizure?

In this case, the trial court upheld the seizure and search of defendant's automobile without a search warrant as a seizure of "an instrumentality used in the commission of the crime", and the majority opinion concurs with this reasoning. I also concur with this reasoning, but feel that more explanation should be given. The rationale followed by the trial court is supported in the recent case

TEXT 15 pages

of Trotter and Harris v. Stephens, 241 F. Supp. 33 (1965), which was decided by a United States District Court in Arkansas, and whose eleventh headnote is as follows:-

> "Search of an automobile, which proved to be vehicle in which rape occurred, without search warrant approximately two hours after lawful arrest was not violative of any federal right, and fruits of search including property of victim were not unlawfully obtained."

The above case was affirmed by the Eighth Circuit United States Court of Appeals in a reported decision entitled Harris v. Stephens, 361 Federal (2d) 888 (1966).

In Hemmis v. State of Wisconsin, 24 Wis. (2d) 346, 129 N. W. (2d) 209, the Supreme Court of Wisconsin held that search of automobile without search warrant was justified under exceptional circumstances including showing that officers had probable cause to believe that automobile was used by one or more persons involved in burglary, and that automobile could be and subsequently was used to effect a flight from scene by one of the participants.

The constitutional restrictions on searching an automobile are an extension of those restricting the search of a private dwelling; however, there is an important difference. A dwelling is static and is not readily moved, but an automobile is by its nature mobile.

I would hold that the same reasons of public policy that I believe permit the search of a dwelling house when a crime has been committed on its premises without

a search warrant would also permit the search and seizure of a motor vehicle without a search warrant when the law enforcement officers have reasonable cause to believe either that a felony has been committed within the motor vehicle, or that the motor vehicle was used in the commission of a felony.

I would further hold that the fact that a motor vehicle is moved from the scene of the crime should not affect any constitutional restrictions as to its search and seizure.

In the instant case, no matter where defendant's automobile was driven after it left the scene of the crime, it does not change the fact that the law enforcement officers had reasonable cause to believe that this automobile was used to drive the victim to the scene of the crime, and that the chain of events that led directly to the murder of the victim commenced within this automobile.

I would hold that defendant's automobile was an integral part of the scene of the crime when the crime was committed, and that the fact that defendant detached this automobile as a part of the scene of the crime by driving it from the scene of the crime does not change its character as a part of the scene of the crime, and does not change the effect of the constitutional provisions against an unreasonable search and seizure of this automobile.

In the instant case, defendant was arrested on a

Sunday afternoon in Ashtabula by a deputy sheriff, and had to be transported to Jefferson, the county seat. Defendant did not have his automobile with him, and the automobile remained in Ashtabula. Within a reasonable time after defendant was incarcerated in the Ashtabula County jail, the sheriff ordered the seizure of defendant's automobile.

Defendant contends that a search warrant should have been obtained and probably could show that a search warrant could have been obtained by contacting all the available judges in Ashtabula County at their homes.

Defendant, therefore, contends that the failure of the law enforcement officers to obtain a search warrant made the seizure and search of defendant's automobile "unreasonable" and was a violation of defendant's constitutional rights. As authority for his position, defendant cites the cases of Preston v. United States, 376 U. S. 364, 11 L. Ed. (2d) 777, 84 S. Ct. 881, and State v. Bernius, 177 Ohio St. 155. However, examination of these cases will show that none of them concerned the seizure of an automobile that the law enforcement officer had reasonable cause to believe was used in a specific felony.

Under the circumstances of this case, I concur that the seizure and search of defendant's automobile was reasonable and did not violate defendant's constitutional rights guaranteed under either the Fourth Amendment of the United States Constitution or under Section 14 of Article I

of the Ohio Constitution. I feel that this is true either under the rationale of "an instrumentality used in the commission of the crime", the "exceptional circumstances" enunciated in the case of Hemmis v. State, or the "scene of crime" investigation by law enforcement officers that I have advanced in this opinion.

Johnson, J., Concurs

APPROVED;

JOHN J. LYNCH
JUDGE.

Supreme Court, U.S.

October Term, 19 67

Term, No. 1700 Misc.

Robt. L. Pruett,

Petitioner,

vs.

Ohio

Respondent's brief in opposition

Filed May 21, 19 68

IN THE

SUPREME COURT OF THE UNITED STATES
NO. 1700 MISC., OCTOBER TERM 1967

RECEIVED
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SUPREME COURT, U.S.

ROBERT LEROY PRUETT,

PETITIONER

-vs-

STATE OF OHIO,

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH APPELLATE DISTRICT OF THE STATE OF OHIO

BRIEF FOR THE STATE OF OHIO IN OPPOSITION

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INDEX TO BRIEF

OPINIONS BELOW..... 1

JURISDICTION..... 1

CONSTITUTIONAL PROVISIONS AND STATUTES..... 2

QUESTIONS PRESENTED..... 2, 3

STATEMENT OF THE CASE..... 4

REASONS FOR DENIAL OF THE WRIT

FIRST REASON

THE MOTOR VEHICLE OF DEFENDANT WAS SEIZED AND SEARCHED, SUBSTANTIALLY CONTEMPORANEOUSLY WITH TIME AND PLACE OF ARREST..... 11

SECOND REASON

DURING A GENERAL INQUIRY INTO AN UNSOLVED MURDER, WHEREIN THE INVESTIGATION HAS NOT BEGUN TO FOCUS ON ANY INDIVIDUAL, A STATEMENT AGAINST INTEREST MAY BE USED AT A CRIMINAL TRIAL AGAINST SAID INDIVIDUAL..... 16

THIRD REASON

MERE INDICATION BY PROSPECTIVE JUROR DURING VOIR DIRE, THAT HE HAD DISCUSSED THE CASE PRO AND CON PRIOR TO TRIAL, DOES NOT DEPRIVE DEFENDANT OF A FAIR AND IMPARTIAL TRIAL..... 20

FOURTH REASON

AN INDICTMENT FOR MURDER MAY BE AMENDED BY INSERTION OF THE WORDS "OR ATTEMPTING TO PERPETRATE A RAPE" IMMEDIATELY FOLLOWING THE WORDS "IN THE PERPETRATION OF A RAPE"; SUCH AMENDMENT NOT BEING A CHANGE IN THE NAME OR IDENTITY OF THE CRIME CHARGED AND NOT PREJUDICING THE ACCUSED IN HIS DEFENSE..... 23

FIFTH REASON

WHERE, IN THE TRIAL OF A CRIMINAL CASE, EVIDENCE IS INTRODUCED IN REBUTTAL BY THE STATE TO MEET A CLAIM OR THEORY OF THE DEFENSE, NO ERROR IS COMMITTED UNLESS ABUSE OF DISCRETION IS SHOWN..... 25

SIXTH REASON

THE PUNISHMENT OF DEATH IS NOT IN VIOLATION OF THE CONSTITUTIONAL PROHIBITION OF CRUEL AND UNUSUAL PUNISHMENT, SO LONG AS THE DEATH INFLICTED IS SPEEDY AND WITHOUT UNDUE PAIN OR TORTURE..... 27

SEVENTH REASON

THE STATE, AS WELL AS THE DEFENDANT, IN THE TRIAL OF CRIMES PUNISHABLE BY DEATH, HAS THE RIGHT TO AN IMPARTIAL JURY, AND IN ORDER TO SECURE IT, HAS THE RIGHT TO CHALLENGE FOR CAUSE ANY PROSPECTIVE JUROR WHO IS SHOWN TO ENTERTAIN BELIEFS REGARDING CAPITAL PUNISHMENT WHICH WOULD BE CALCULATED TO PREVENT HIM FROM JOINING IN ANY VERDICT CARRYING THE DEATH PENALTY..... 28

CONCLUSION..... 29

TABLE OF AUTHORITIES

Alexander v. Green, 2 Ohio State (2d) 231..... 20
Bryant v. State, 48 Ohio Appellate 208..... 23
Carroll v. U.S., 69 L ed 543, 553..... 13
Cooper v. California, 87 S.Ct. 788..... 14
Escabedo v. Illinois, 378 U.S. 478..... 18
Farrer v. State, 2 Ohio State 54..... 21
Go-Bart Importing Company v. U.S. 282, U.S. 344, 347..... 12
Gossett v. State, 48 S.E. (2d) 71..... 22
Henry v. U.S., 4 L ed (2d) 136..... 17
Holt v. Ohio, 107 Ohio State 307..... 26, 28
Huddleston v. State, 64 Southern (2d) 90..... 22
Itskin v. State, 51 Ohio Appellate 211..... 25
In Re William Kemmler, 136 U.S. 436..... 27
Kent v. State, 42 Ohio State 426..... 21
Lindsey v. State, 25 S.W. (2d) 533..... 22
Locicero v. State, 14 Ohio Law Abstract 109..... 22
Mallory v. U.S., 354 U.S. 449..... 18
Martin v. State, 16 Ohio Reports 364..... 28
People v. Carroll, 238 N.Y.S. (2d) 640..... 13
People v. Evans, 246 Pacific (2d) 636..... 22
People v. Thayer, 408 Pacific (2d) 108..... 13
Preston v. U.S., 376 U.S. 364..... 12
Schwindt v. Graeff, 109 Ohio State 404..... 21
State v. Bernius, 177 Ohio State 155..... 12
State v. Ferguson, 182 S.W. (2d) 38..... 22
State v. Finnell, 280 S.W. (2d) 110..... 22
State v. Holt, 59 Ohio Appellate 309..... 24
State v. Ingersoll, 292 Pacific 250..... 22
State v. Lett, 106 Ohio Appellate 285..... 25
State v. Milan, 108 Ohio Appellate 254, 268..... 17
State v. Miles, 69 N.E. (2d) 39..... 21
State v. Oliver, 192 Southern 725..... 22
State Ex Rel. Sadler v. District Court, 70 Mont. 378..... 17
Stoner v. California, 376 U.S. 483..... 12
U.S. v. Rabinowitz, 339 U.S. 57..... 12, 14
U.S. v. Ventresca, 380 U.S. 102..... 13
Warden, Maryland Penitentiary v. Hayden, 18 L ed (2d) 782..... 13
Wicker v. Cleveland, 150 Ohio State 434..... 21

TEXT

30 ALR 1452..... 28
48 ALR 563..... 29
16 Ohio Jurisprudence (2d) 56..... 21
52 Ohio Jurisprudence (2d) 561..... 25

CONSTITUTION

CONSTITUTION OF THE UNITED STATES:

Fourth Amendment..... 2, 11, 13
Sixth Amendment..... 2, 28
Eighth Amendment..... 2, 3, 27

STATUTES AND RULES

OHIO REVISED CODE:

Section 2941.30..... 23, 24
Section 2945.10..... 25
Section 2945.25..... 29

28 U.S.C.A. 1257 (3)..... 1

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 1700 MISC., OCTOBER TERM 1967

ROBERT LEROY PRUETT,

PETITIONER

-vs-

STATE OF OHIO,

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH APPELLATE DISTRICT OF THE STATE OF OHIO

BRIEF FOR THE STATE OF OHIO IN OPPOSITION

OPINIONS BY COURTS BELOW

The opinion of the Supreme Court of the State of Ohio is contained in the Petition for Writ of Certiorari, pages 33-35.

The opinion of the Court of Appeals for the Seventh Appellate District of the State of Ohio is appended to the Petition for Writ of Certiorari as attachment to Appendix, pages 1-8 and pages 1-11.

JURISDICTION

The judgment of the Ohio Supreme Court dismissing the appeal sua sponte was rendered on the 20th day of December, 1967, a copy of same appearing on Petitioner's Petion for a Writ of Certiorari to the Supreme Court of the United States, pages 33-35.

The jurisdiction of this Court is invoked under 28 U.S.C.A. 1257 (3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTION OF THE UNITED STATES:

AMENDMENT IV - SEARCHES AND SEIZURES -- Set forth on page 29 29 of Petitioner's Petition in Writ of Certiorari to the Supreme Court of the United States.

AMENDMENT VI - RIGHTS OF ACCUSED -- Set forth on page 29 of Petitioner's Petition in Writ of Certiorari to the Supreme Court of the United States.

AMENDMENT VIII - EXCESSIVE BAIL, FINES, PUNISHMENTS -- Set forth on page 29 of Petitioner's Petion in Writ of Certiorari to the Supreme Court of the United States.

STATUTES:

OHIO REVISED CODE, Section 2941.30 -- Set forth on pages 30-31 of Petitioner's Petition in Writ of Certiorari to the Supreme Court of the United States.

OHIO REVISED CODE, Section 2945.10 -- Set forth on pages 31-32 of Petitioner's Petition in Writ of Certiorari to the Supreme Court of the United States.

28 U.S.C.A. 1257 (3) -- Set forth on page 32 of Petitioners Petition in Writ of Certiorari to the Supreme Court of the United States.

QUESTIONS PRESENTED

1. Whether the seizure and search of defendant's motor vehicle, without a search warrant, is in violation of the Fourth Amendment to the United States Constitution, and whether admission of evidence obtained from said search in the trial of the cause constitutes reversible error.

2. Whether a statement against interest, obtained from a person during a general inquiry into an unsolved crime and when the investigation has not begun to focus upon said individual, may be properly accepted in evidence.

3. Whether a prospective juror, who during voir dire states that he has discussed the case pro and con prior to trial and further states that he has no opinion as to guilt or innocence, may be allowed to serve as a juror at the trial of the cause.

4. Whether an indictment for murder may be amended by insertion of words "or attempting to perpetrate a rape" immediately following the words "in the perpetration of a rape", and whether such amendment is a change in the name or identity of the crime charged.

5. Whether, in the trial of a criminal case, evidence may be introduced in rebuttal by the State to meet a claim or theory of the defense, and whether, if such rebuttal evidence is admitted, the Trial Court must, as a matter of law, allow introduction of surrebuttal evidence.

6. Whether the imposition of the death penalty upon the defendant as a consequence of the State's conviction of murder in the first degree without a recommendation of mercy, is violative of the Eighth Amendment of the United States Constitution which prohibits the infliction of cruel and unsual punishment.

7. Whether the exclusion of several prospective jurors on the sole ground that they are opposed to capital punishment prevents the defendant from having a fair and impartial jury trial.

STATEMENT OF THE CASE

It should be noted that all references hereinafter made to the record refer to Volume 2, unless otherwise noted.

The defendant was charged by the Grand Jury of Ashtabula County at its September, 1964 term with murder in the first degree for the killing of Susan Osborne, while in the perpetration of a rape or attempting to perpetrate a rape on or about September 15, 1964. As is stated in the defendant's brief herein the words "or attempt to perpetrate a rape" were added to the indictment by interlineation by order of the Court (R. 590-591).

On September 19, 1964, the body of a dead girl, later to be identified as the victim, Susan Osborne, was discovered by a young boy and his father in a wooded area South of Lake Road near Lake Erie in Ashtabula County. The body was near a lane which traveled South from Lake Road to a dead end. The body was approximately 100 feet from Lake Road and approximately 15 feet from the lane, and because of the vegetation overgrowth, it could not be seen from the lane or from Lake Road.

Upon the discovery of the body of the victim the police were summoned, the area was roped off, the Coroner was summoned, and photographs were taken. In all of the preliminary testimony regarding the finding of the body, all witnesses stated that the body was not touched or moved in any way until after the photographs had been taken. The photographs which were admitted into evidence show the difficulty in observing the body from the lane, the condition of the terrain in which the body was found, the position of the body when found, the condition of the body when found, the clothing found near the body, and the condition of the various injured and identifying parts of the body. These photographs showed that the body was nude, lying upon its back, that the legs of the victim were spread, and that the body contained a puncture wound in the upper chest and severe damage to the face. Maggots had contaminated the open cavities of the

body.

The body was examined on the scene by the Coroner, Dr. John Higerd. He found the body to be in the condition as above described and found a bruise over the left hip, a bruise over the right hip, and streaks of blood running from the wound in the chest over the upper portion of the chest and the right shoulder. (R. 102, 112). Among the clothing found near the body was a blouse and a brassiere. The blouse had a small cut in it which corresponded with the wound in the chest of the victim. Both the blouse and the brassiere were encrusted with blood. (R. 123, 125). Death was caused by lack of oxygen due to the damage to the face and throat and the clotting of blood. (R. 146). The victim lived at least 45 minutes after the injuries were inflicted. (R. 149). The victim died at Whitman's Creek, North Kingsville in Ashtabula County, Ohio were the body was found (R. 149) between 4 and 5 days prior thereto. (R. 149).

At the County Morgue in Ashtabula an autopsy was performed on the body of the victim by Dr. Jason Dixon on the evening of September 19, 1964, commencing at about 9:45 P.M. (R. 198). Dr. Dixon is a pathologist at the hospital and had performed at that time approximately 1600 autopsies. (R. 197). Dr. Dixon found in the vagina of the victim a substance which contained an extremely high acid phosphatase content. (R. 208). Dr. Dixon testified that semen had one of the highest concentrations of acid phosphatase and that there was no way that acid phosphatase would be found in the vaginal tract other than by artificial insemination or normal sexual intercourse. (R. 208, 209). Dr. Dixon testified that the victim had had intercourse within 12 hours of the time of death. (R. 210). The doctor testified that he found no spermatozoa and that the absence of spermatozoa could not exclude sexual intercourse. (R. 206). Dr. Dixon testified that in his opinion the decedent had died approximately 4 days prior to the autopsy. (R. 211).

The victim's mother, Mrs. Rantamaki, testified that the victim had completed her menstrual period on Monday, September 14, 1964, (R. 176). Normal menstruation would have eliminated any evidence of intercourse had prior thereto. The blood encrusted upon the blouse of the decedent at the hole in the blouse which corresponded with the wound in her chest, was found upon an examination at the FBI Laboratory in Washington (R. 558) to be type B, the same as that of the decedent. The blood on the brassiere of the decedent was found to be human blood but it could not be typed. (R. 565).

The defendant was 26 years old at the time he committed this offense. He had married his 17 year old wife in Las Vegas a few months before coming to Ashtabula County to live with his mother-in-law in Conneaut. He and his wife were working in Las Vegas and earning approximately $180.00 a week. (R. 695). They arrived in Conneaut with no employment arrangements. They lived with the mother-in-law and paid no room or board, other than work performed around the premises. The defendant testified that he had been in jail in Oregon for violating probation and that he had served in the Armed Forces during which time he had 3 court martials and admitted to being AWOL on numerous occasions. (R. 736).

The defendant purchased a 1953 Ford a few weeks prior to September 15, 1964. At the time of purchasing the automobile, he was employed at Manpower Training School in Ashtabula, Ohio. His wife was employed as a baby sitter at the time of the death of the victim in Ashtabula, Ohio. On Thursday, September 10, 1964, the defendant and his wife met the victim and a girl friend of the victim, Ann Kent, who was then known as Ann Shackel, her mainden name, at or near a tavern in Conneaut. (R. 227). The defendant and his wife, the victim and Ann Kent and two other men purchased some beer and went to a beach near Conneaut where the beer was consumed. At or near midnight on that night the party, with the exception of one of the men, returned to a bar in Conneaut at which the decedent danced with the defendant on two occasions. (R. 231).

Defendant purchased drinks for the victim on that evening.

On the night of Monday, September 14, 1964, the defendant and his wife and a man named Norman Balcomb and the deceased made the round of several bars in Conneaut. During the evening Mrs. Kent saw the defendant on several occasions. The last time that Mrs. Kent saw the defendant and the victim was at about 11:30 P.M. in downtown Conneaut. At the time the defendant and his wife were seated in the front seat of the defendant's 1953 Ford and Balcomb and the deceased were seated in the back seat. The deceased asked Mrs. Kent to accompany them and she refused. (R. 240).

During the course of the evening of September 14, 1964, the defendant stated to Balcomb that he had "got in her pants" regarding the deceased. (R. 287). On the same evening he also told Stanley Pachkowski that he "made" Susan, the deceased. (R. 359).

Some time around midnight on the night of September 14, 1964, the defendant took his wife home and he and Norman Balcomb and the deceased proceeded from Conneaut to Ashtabula. During the course of the evening and ending at or about midnight the deceased had eaten most of two bags of pretzels (R. 925) at a bar and grille. During that time the defendant had made comments regarding the switching of partners. (R. 293). At the time the comments were made, Balcomb was with the decedent and the defendant was with his wife. During the course of the evening Susan Osborne had consumed several drinks as had the defendant and Norman Balcomb. Norman Balcomb attempted to make advances on the deceased in the car on the way to Ashtabula, but was essentially unsuccessful. The defendant left Norman Balcomb out of his automobile near Balcomb's home in Ashtabula on September 15, 1964 at about 12:15 A.M. The deceased got into the front seat of the defendant's car as they left Balcomb.

The defendant's wife testified that the defendant returned home at approximately 1:30 A.M. and that she had never left the house. The testimony was controverted by the rebutal witness, who

testified that the wife left the house at about 3:10 A.M. The defendant's wife stated that the defendant told her at about 1:30 A.M. that the deceased had jumped out of defendant's car near the General Hospital in Ashtabula and had not returned to Conneaut with the defendant. However, on the following day when Mrs. Kent went to the defendant's home she was told by the defendant's wife that she and her husband had left the deceased out of the automobile in Conneaut at about 12:00 the night before. (R. 241). The defendant's wife also admitted that she told the police the same story about letting the deceased out in Conneaut. (R. 685). On the same evening of September 15, 1964, the evening of the morning following the murder, defendant and his wife went to the home of Norman Balcomb where they told Balcomb, out of the hearing of other persons present, that Susan was missing, and that if Balcomb was questioned by the police about her being missing, he should tell the police that Mrs. Pruett had come to Ashtabula with Balcomb and Mr. Pruett and that they had left Susan in Conneaut. (R. 307). The defendant had been visibly upset at work at Manpower Institute as testified to by several witnesses on the working day of September 15, 1964, and he had left work from about 10:00 A.M. to 2:00 P.M. on that day.

On September 15, 1964, following the death of the deceased, the defendant had a small cut, not a half inch in length, on the knuckle of his right hand. (R. 405). The following day, September 15, 1964, the defendant told a working companion, George Temple, that in taking the deceased girl from Conneaut to Ashtabula, his wife had accompanied him. (R. 406).

On Saturday, September 19, 1964, the day that the body of the victim was found, the Pruetts stayed the night in Ashtabula with the Balcombs. The following day the Pruetts moved from Conneaut to an apartment that they had rented in Ashtabula. They moved their belongings in boxes in the 1953 Ford.

Upon determining that Norman Balcomb had been with the deceased

on the last evening that she was seen, the police interviewed Balcomb and advised them that the defendant had been with the deceased after he had left the defendant's vehicle. The officers went to the home in Ashtabula where the Pruetts had moved and asked the defendant to come to the Station to talk to them. (R. 444). Defendant voluntarily went with the officers to be questioned. He told his wife that he would return in about two hours after being questioned. (R. 690). The defendant was questioned by Detective Harold Roach at the Ashtabula Police Station. Detective Roach's testimony on the subject commencing at (R. 448) is as follows:

"A I explained to Robert at this time of the investigation that we were working on and that it pertained to the death of a 17 year old girl, known as Susan Osborne, from Conneaut. I told him that I knew that he had been in the presence of this girl and of how terrible this crime is and I asked him if he wanted to talk to me about it and wanted to tell me about it and I advised him that he didn't have to say anything to me until he got an attorney. He could call whoever he wanted for help, but I felt sure if he was involved in this it would be best if he tell me about it."

"Q What did he say to that?"

"A Robert Pruett stood there for quite some time with his head bowed and again I asked him if he had been in the area over there, the Whitman's Creek area on Lake Road and if he wanted to tell me about it. Well, again he stood silent for, oh, maybe a minute and finally he said, 'Yes, I did drive the girl over there.' He said, 'We went east on Lake Road to Whitman's Creek.' And I said, 'What did you do after you got to Whitman's Creek?' He said, 'I parked on the south side of the road. I turned to the right.'"

"Q. I didn't hear that."

"A He said he turned to the right in this parking area off of Lake Road and I said, 'Well, how did you park, Robert"' 'Well,' he said, 'I turned around in this area.' And then I asked him what direction the car would be when he parked. 'Well,' he said, either the lake or Lake Road, the head of the car, the front of the car.' And I asked him how long he was there and he said, 'I don't know."

"Well, what did you do while you were there.' I asked him. He said, 'We talked and I drank a can of beer.' And I asked him what kind of beer this was and he said, 'Genessee.' I asked him if she drank any beer and he said no. After he drank the beer he said he threw the can out of the driver's side of the car and again I asked him what happened then. And he said, 'I made a couple of passes at her and she got out of the passenger side of the car.' Again I asked him what happened."

"He said he slid across the seat and got out the same side. I said, 'Go ahead, what heppened then?' He said, 'An argument started."

"About this time a police officer from Conneaut came through the hallway to Robert's right and at this time Robert had his head bowed. This was the position in which he was talking to me and evidently he noticed the officer come around the corner and immediately Robert says, 'I didn't do it.' He repeated it twice.

"At this time I told Robert that I was going to have to arrest him and take him to Jefferson."

"Q This was Sunday now, wasn't it?"

"A Yes sir."

"Q What time was this again?"

"A This was shortly before noon."

On the same day, Sunday, September 20, 1964, Detective Roach returned to the scene of the crime and thoroughly searched the area. (R. 452). In the search of the entire area, they found only one Genessee beer can and that was located next to the driveway about 25 to 30 feet from where the body of the deceased was found. (R. 452, 453).

On the afternoon of September 20, 1964, the Sheriff was advised that the defendant had a 1953 Ford automobile in which he had driven the deceased to the scene of her death and he ordered the car impounded (R. 463, 464), because "it was an instrumentality in the commission of this crime". (R. 464).

This vehicle could not be located at defendant's residence in Ashtabula, Ohio, however, it was later learned that defendant's wife had requested Balcomb to take this 1953 Ford automobile to Balcomb's residence, which was done. Shortly thereafter, Balcomb called the police and requested that the vehicle be removed from his residence. Thereafter, the vehicle was impounded and was in custody until the time of the trial. Upon a search of the vehicle, on the day following the arrest of Pruett, Detective Roach found a spot on the seat cover and on the grille cover of the car radio. (R. 485 to 487). These spots were later analyzed by a chemist for the Federal Bureau of Investigation, who found each spot to be human blood. The blood on the radio grille could not be typed (R. 569), but the blood on the seat cover was typed B, (R. 579), the same as the deceased.

Regarding the eating of pretzels by the deceased and the time for digesting the same, the record disclosed that the decedent con-

sumed two bags of pretzels between 11:35 P.M. and about midnight. (R. 342). The Coroner testified that it would take approximately two hours for the pretzels to be digested (R. 163) or less, if they had been chewed. (R. 169). Dr. Dixon testified that digestion could have taken place within an hour. (R. 219). The decedent lived at least 45 minutes after she was attacked. (R. 149).

REASONS FOR DENIAL OF THE WRIT

FIRST REASON

The defendant claims that the search and seizure of defendant's Ford automobile was unlawful in that it was conducted in violation of the 4th Amendment to the Federal Constitution and sets forth verbatim said Amendment.

The Court's attention is directed to the use of the word, unreasonable, in said Amendment and it is hereby submitted on behalf of the State of Ohio that the search and seizure herein made was not unreasonable as will be more fully explained hereinafter.

In this case the defendant was requested by police officers to go with them to the Ashtabula City Police Department for questioning concerning the death of one Susan Osborne. At this point the police officers were in the investigatory stage of this investigation with no focus of guilt or involvement in the crime being directed towards the defendant. Defendant voluntarily went to the Station House and believed that he would be returning home shortly because he so advised his wife. The actual arrest of the defendant came only after he made a statement to the police officer concerning his involvement. The defendant's automobile had been moved from his residence to another location, however, the police officers seized same at a time substantially contemporaneously with defendant's arrest, which was on a Sunday afternoon, and searched the automobile on the following day, and as the evidence indicates, said officers found evidence of blood in the automobile matching that of the victim.

The defendant relies heavily on decisions of the United States Supreme Court, Stoner v. California, 376 U.S. 483, 11 L ed 2d 856; Preston v. U.S., 376 U.S. 364, 11 L ed 777 and State v. Bernius, 177 O.S. 155, however, it should be noted that in the Stoner case the problem involving the Supreme Court was one of consent to search being given by a person other than the occupant of a hotel room in the Preston case an arrest for vagrancy and a subsequent charge of conspiracy to rob a Federally insured bank, and in the Bernius case the problem involved was an arrest for changing lanes in volation of a city ordinance and a subsequent trial on the charge of having unlawfully in his possession or under his control obscene, lewd or lascivious photographs.

It is hereby submitted that none of the factual situations contained therein are applicable to the present case.

It is noted with interest that in the Preston case, pages 366-367, the Court said,

> "....Common sense dictates, of course, that questions involving searches of motorcars or other things readily moved cannot be treated as identical to the questions arrising out of searches of fixed structures like houses. For this reason, what may be an unreasonable search of a house may be reasonable in the case of a motorcar."

The Supreme Court of the United States and the State Courts have historically held that each case is to be decided on its own facts and circumstances. Se Go-Bart Importing Company v. United States, 282 U.S. 344, 357.

With regard to the "mere evidence rule" as alluded to by defendant in his petition, it should be noted that in United States v. Rabinowitz, 339 U.S. 57, 94 L ed 653, the Court held that there is a right to search incidental to arrest and that such searches turn upon the reasonableness under the circumstances and not upon the practicability of procuring a search warrant, for the warrant is not required. The relevant test is not whether it was reasonable to procure a search warrant, but whether the search was reasonable.

It is unclear as to whether the "mere evidence rule" is a constitutional requirement which is binding on the States. Recently

two different states have held the rule inapplicable to the States, while another has limited it to apply only to private papers and books and not to tangible objects such as a pair of shoes. Thus tangible objects could be seized even though they did not fit into the recognized types of seizable items. See People v. Thayer, 408 P. 2d 108 (1965); People v. Carroll, 238 N.Y.S. 2d 640 (1963).

In United States v. Ventresca, 380 U.S. 102 13 L ed 2d 684, the Supreme Court of the United States observed in a footnote in discussing exceptions to search warrants:

> "The exceptions are illustrated by cases in which seizure is impossible except without warrant", Carroll v. United States, 69 L ed 543, 553....such as a search of a moving object where 'it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality of jurisdiction in which the warrant must be sought."

A recent pronouncement of the United States Supreme Court on the "mere evidence rule", is contained in Warden, Maryland Penitentiary v. Bennie Joe Hayden, 18 L ed 2d 782, wherein the Court at pages 788 states:

> "The distinction made by some of our cases between seizure of items of evidential value only and seizure of instrumentalities, fruits, or contraband has been criticized by Courts and commentators." The Court of Appeals, however, felt 'obligated to adhere to it'. We, today, reject the distinction as based on premises no longer accepted as rules governing the application of the 4th Amendment."
>
> At page 793 of the Warden case, the Court also states:
>
> "The rationale most frequently suggested for the rule preventing the seizure of evidence is that 'limitations upon the fruit to be gathered tend to limit the quest itself.' But privacy 'would be just as well served by a restriction on search to the even-numbered days of the month....And it would have the extra advantage of avoiding hair-splitting questions....'. The 'mere evidence' limitations has spawned exceptions so numerous and confusion so great, in fact, that it is questionable whether it affords meaningful protection. But if its rejection does enlarge the area of permissible searches, the intrusions are nevertheless made after fulfilling the probable cause and particularity requirements of the Fourth Amendment and after the intervention of 'a neutral and detached magistrate....' The Fourth Amendment allows intrusions upon privacy under these circumstances, and there is no viable reason to distinguish intrusions to secure 'mere evidence' from intrusions to secure fruits, instrumentalities, or contraband."

The Supreme Court of the United States was confronted with a similar problem concerning search and seizure as is now present in the case of Joe Nathan Cooper v. State of California, 87 S.Ct. 788, decided February 20, 1967, wherein the petitioner was convicted in a California State Court of selling heroin to a police informer. The conviction rested in part on evidence seized by police from the petitioner's impounded automobile, without a warrant, during a search which occurred one week after the arrest of petitioner.

The Court stated that this case is neither Preston nor controlled by it. The officer seized the automobile because of the crime for which they arrested the petitioner. Their subsequent search of the car was closely related to the reason petitioner was arrested, for the reason his car had been impounded, and the reason it was being retained.

The Court further stated that "It is no answer to say that the police could have obtained a search warrant, for the relevant test is not whether it is reasonable to obtain a search warrant, but whether the search was reasonable". See United States v. Rabinowitz, supra.

The Trial Court below held that the seizure of the vehicle in question was permissible, because the vehicle was the implement or an instrumentality used in the commission of the crime and the Court's final ruling upon the Motion to Suppress beginning at page 151 of Vol. 1 of the record is as follows:

> THE COURT: At the previous hearing on this issue while no issue was made of it, the matter wasn't raised, technically I doubt if there is any showing in the record that there was even a lawful arrest of the defendant at the time we are considering. That issue wasn't raised.
>
> At the previous hearing also, there was a showing as to why the car was taken, and of course, it was shown without question it wasn't taken until after the arrest. Well regardless, I should say without reviewing the reasons in the testimony as shown previously with reference to the taking of the car, the most that can be said, as I recall -- I'm pretty sure I'm right on this -- as to why the car was taken were two points. It was found the car had fictitious license plates and the Sheriff also testified he ordered it picked up following a conversation with his deputies.

Now on the strength of that showing I ruled that the seizure and subsequent search was unlawful. My reason was this: Not because of the no showing of the arrest -- no contention was made for that -- but.....

MR. H. NAZOR: We admit he was arrested at the time.

THE COURT: There is no question about, there was no question then made, and there can't be any serious question now made that the arrest at that time was lawful; but admittedly the seizure was after the arrest. It was not commensurate in time with the arrest and at that time there was no showing made as to a plausible reason or excuse for taking the car.

The Sheriff has no right to pick up a motor vehicle parked on private premises because he learns that it has fictitious plates on it. Whether he can take it out on a highway is another point. That is not now to be decided.

Well, it now appears that the reason for taking this car, which probably was the reason the Sheriff referred to but didn't elaborate at the prior hearing, was as Detective Roach has testified, namely, that the defendant told him that he had transported the deceased to the particular place where she was found, in this car.

Now admittedly the seizure with the follow-up examination or search of the car was made with knowledge of that information and, of course, made without a warrant authorizing its search and seizure. So as I see it, the issue is where there is a lawful arrest and probable cause to believe that a motor vehilcle has been used in connection with the commission of the crime -- not necessarily the instrumentality alone by means of which the death is caused, but the automobile which the officers believe was used in connection with the commission of the crime -- may the automobile be seized without having to commit an unlawful search to get it, for instance breaking into a garage?

There isn't any question but what under the facts of this case the car was actually seized without committing a trespass as far as this defendant is concerned, unless the officers had no right to make the seizure at all.

As I view it now, the issue really is this. Following a valid arrest of this defendant and his having made the statement to the officer that he did, may they lawfully seize this car thereafter and search it?

Well, as I understand the rule, and even in the light of the latest Supreme Court cases dealing generally with this subject, as I read them -- and I think I have read all that counsel have cited and some besides -- I don't think the rule as previously announced has been abridged by those cases, and the rule long has been announced in many, many cases, many, many annotations, as I understand it, the rule is as follows: "That where a lawful arrest is made, a search of the person and of the place where the arrest is made may be had...." That isn't what we are dealing with right now, of course. "And the officers may seize and hold property so found which they reasonably believe is connected with the crime charged, no search warrant is needed to authorize seizure of such articles."

Now the officers did not take the defendant from the car, so it might well be argued that the officers couldn't take the car, pinned closely to only the language of such a rule; but I believe that is backed up by -- and almost without question -- these cases, many of

them in these annotations that I have noted where the officers believe that the car is used in connection with and may bear evidence of the commission of the crime for which the lawful arrest is made, they may make the seizure of the property if they do not have to commit an unlawful search to get it. And in this case there was no unlawful search of any premises to get this car, at least nothing unlawful so far as the defendant is concerned.

If we are to say that the officers can't seize the car when they can do so without committing a breach of the peace, if it is to be said that the officers cannot take in order to produce proof of guilt of the defendant under the circumstances here shown, then in my judgment an entirely new rule will have to first be written. I don't read any of the United States Supreme Court cases that way.

There are many of them dealing with this subject in use of evidentiary matter only; however, on examination I find those to be cases dealing not with the seizure of articles by which proof of the crime for which the arrest has been made -- the proof will be had -- but of some other offense. And by and large those cases hold that if the possession of that other evidentiary article is unlawful and hence the article by reason thereof is contraband, even then it may be used. But if it is not, and if the seizure is made as an evidentiary seizure only, in some other case beyond and different than the one for which the arrest is made, such an article thus seized may not be used. That again is not our situation here.

It is my opinion the seizure of this car under the facts shown was justified and the motion to suppress will be overruled.

MR. H. NAZOR: Are you ruling that our motion to suppress any evidence taken from the car is overruled too?

THE COURT: Yes sir.

MR. H. NAZOR: Very well.

THE COURT: I think that follows as a matter of course. If the right to seize the car exists, the right to examine it follows and the right to use the results of an examination or search -- call it what you will. And the first issue as I see it, did they have a right to seize the car? I think they did. Therefore, I think they had a right after the lawful seizure, certainly, to examine it.

SECOND REASON

We believe that the defendant must concede that the State is entitled to have the evidence interpreted most favorably to it as the jury verdict was rendered in favor of the State. The testimony of Detective Roach, as it was given, is as follows:

> "I told him that I knew that he had been in the presence of this girl and how terrible this crime is, and I asked him if he wanted to talk to me about it and I advised him that he didn't have to say anything to me until he got an attorney. He could call whoever he wanted for help, but I felt sure if he was involved in this, it would be best if he would tell me about it." (Emphasis added)

Throughout defendant's argument on this point he has contended that he was under arrest at the time his statement was made. The evidence emphatically refutes such contention. There can be no doubt that the defendant expected to be questioned by the police. By his own testimony he had discussed with Norman Balcomb what story would be given to the police when they were questioned. When the police came to the defendant's home to question him, he went voluntarily. This statement is not only supported by the officers involved, but by the testimony of the defendant's wife that he would return in a couple of hours. (R. 690). The officers did not wish to detain the defendant and the defendant did not believe that he was being detained. A succinct and often followed definition of arrest is found in State ex rel. Sadler v. District Court, 70 Mont. 378, 225 P. 1000:

> "To constitute an 'arrest', four requisites are involved: A purpose to take the person into custody of the law, under real or pretended authority and an actual or constructive seizure or detention of his person, so understood by the person arrested.".

See also State v. Milam, 108 Ohio App. 254, 268, wherein the above definition was quoted with approval.

The body of the deceased girl had been found the evening before the questioning of the defendant. The defendant's name and address were received from Norman Balcomb who was at that time being questioned at the police station. The purpose of the investigation and the questioning of the defendant was strictly investigative, and at that time had nothing to do with accusation. The statement of Detective Roach to the defendant clearly supports this fact.

After being arrested, while still at the Ashtabula Police Station, the defendant's wife called him. The police permitted the defendant to talk to his wife on the telephone. (R. 690). This act is totally inconsistent with defendant's claim of an inquisition as being held incommunicado.

The well established rule laid down by the United Supreme Court in Henry v. U.S., 4 L ed 2d, 136, is that:

> "An arrest is made the moment a man's movements are restricted and not when a formal arrest is made."

The defendant here did not believe that his movements were restricted. He told his wife as he left with the officers that he would return in approximately two hours. Detective Roach did not restrict the defendant's movements as he testified that he went to the police station in order to talk to the defendant, and that there was no room available to his knowledge for a discussion, so they spoke in an open corridor in a locker area at the Ashtabula City Building. The defendant was not under arrest at the time of making the incriminating statements to Detective Roach.

The defendant has cited many familiar and leading cases of the United States Supreme Court and other Courts, which in recent times has had occasion to discuss the fundamental constitutional rights of a prisoner in greater detail than was done in the past. Rather than burden the length of this brief with discussion of each of these cases, we believe it sufficient to examine Escabedo v. Illinois, 378 U.S. 478 (1964) and Mallory v. U.S., 354 U.S. 449. The Escabedo case as cited by the defendant at page 15 of their petition holds "....When its focus is on the accused and its purpose is to elicit a confession", an accused must be permitted to consult with an attorney. In the instant case the accused was advised of his rights to consult with an attorney. He was advised that he could seek any help he desires. Furthermore, he was not an accused. It must be apparent to the Court that at this state, early on a Sunday following the Saturday evening discovering of the body, the police were seeking information, simply investigating the killing. By simple view of the body, they knew that they had a murder.

In the Mallory case, the defendant was arrested on suspicion of rape. The Court said that the arrested person could be booked by the police but thereafter an inquiry, designed to elicit damaging statements to support the arrest, could not be conducted. In the instant case, the defendant, Pruett, was not arrested, nor was an inquiry had to attempt to elicit damaging statements. As the defendant repeatedly points out, Detective Roach did not even have

a witness with him when questioning the defendant, nor was he attempting to write down the statements made by the defendant. Certainly, Detective Roach, who had been a police officer for many years, knew that if he sought damaging statements from a person, to be used against him to prove his guilt, said statements would be more convincing if there were other witnesses present when the statements were made, and if then reduced to writing. The fact that there were no other witnesses, and that he was not taking notes, clearly indicates that he was investigating the matter and was not attempting a Star Chamber proceeding, as is implied by the defense.

There is presently a mild clamour in law enforcement circles regarding the rulings of the Court as to rights of a person under the Bill of Rights. Law enforcement officers sometimes contend that to grant to a party the right of counsel and other constitutional rights presumably curtail their effectiveness. Regardless of the validity of this argument, this Court must be aware that to hold that under the circumstances of the instant case, the actions of Detective Roach violated any constitutional right of this defendant, requires this Court to hold that a police officer may never use a statement made by a person which incriminates that person. In the instant case, there was no confession. The police officer was investigating an apparent murder. He was talking to a person who was reportedly the last person to be with the deceased. He stated he had not arrested this person, and the person, by his comments to his wife, indicated that he did not believe he was being detained. There is no case which holds that the admission against interest made by the person not being detained may not be admitted in a Court of law.

While we believe it was not necessary under these circumstances, certainly the fact that Detective Roach advised the defendant that he could talk to an attorney or could seek other help completely abrogates any sinister or accusatory motive on the part of this

officer and would comply with the constitutional requirements had the defendant been under arrest.

It should be noted that the defendant relies heavily on principles of law set forth in Alexander v. Green 2 O.S. (2d) 231, 31 O.O. (2d) 231, however, a cursory reading of this case indicates that in the Alexander matter a statement was elicted from the defendant after arrest, and is, therefore, distinguishable from the present matter, because statement was given prior to any arrest.

THIRD REASON

The defendant here contends that the defendant was not afforded a fair and impartial jury because of prejudice on the part of a juror. The State agrees that the defendant was entitled to receive a jury consisting of impartial members of the public. Defendant received such a jury. In his motion for a new trial filed below, the defendant contended that one of the jurors was prejudiced in spite of the fact that that juror was interrogated by counsel for the defendant on the voir dire examination, admitted that he had heard comments regarding the case, and denied that he had at that time formed an opinion as to the case. The defendant attempted to show this prejudice on the part of that juror by affidavits and testimony of other members of the jury panel. There was no outside evidence produced whatsoever.

On the basis of this showing, the Court below in essence refused to consider the claim of prejudice complying with that doctrine predicated on public policy that a verdict of a jury cannot be im-

peached solely by the testimony of its members or of the panel. Thus, contrary to the impression given in the petition of the defendant, the Court below did not rule that the juror charged with prejudice was free of prejudice, but the Court ruled in essence that there was no evidence upon which a hearing into that matter could be had.

The Trial Court's opinion on this matter set forth in its Opinion on a Motion for New Trial, noted in Petitioner's Appendix pages 6, 7, 8, 9 and 10 is as follows:

> "Under its claim of misconduct of the jury, the defense sought to prove what it claimed amounted to misconduct of the jurors and sought to do so solely through evidence by way of an affidavit of one of the jurors and the oral testimony of another. No evidence aliunde or dehors the proposed testimony of the jurors was offered. The Court rules such evidence inadmissible. The claim is made that since the acts amounting to claimed misconduct occurred outside the Jury Room, or at least prior to the final submission of the case, that the usual rule of aliunde evidence is not applicable and that the jurors themselves may be called directly to testify concerning such matters and in this way thus impeach their verdict.
>
> Before proceeding further, it should be pointed out that the claimed misconduct, if it were such, deals only with the communications of the jurors among themselves, that is to conversations concerning evidence admitted upon the trial and not in any way touching upon an outside communication or factual matters not in evidence. The rule has long been adhered to in this state that affidavits of jurors stating matters of alleged misconduct are not competent to support an application for a new trial unless evidence aliunde is first offered or unless the Court has acquired knowledge of the Jury's behavior from other sources. 16 OJ 2d 56. True, in most instances where the issue has arisen, efforts have been directed toward uncovering what went on in the Jury Room after final submission or with claimed communications with the jurors by outsiders, as distinguished from what is claimed to have transpired before final submission of the case. Examples of this type of cases in Ohio are Farrer v. State, 2 OS 54; Kent v. State, 42 OS 426; Schwindt v. Graeff, 109 OS 404; Wicker v. Cleveland, 150 OS 434; and State v. Miles, 69 NE 2d 39. The rule is one of deep seated public policy to the effect that testimony or affidavits of jurors themselves will not be received for the purose of impeaching the verdict, at least until other evidence on the subject is first offered.
>
> Whether the claimed misconduct occurred before or after final submission of the case to the jury, the policy involved would be violated in either event if the jurors alone were allowed to thus impune the verdict. Panel

members become jurors immediately upon being sworn. The finality of jeopardy then attaches and the jurors certainly do not don a different cloak when the case is finally submitted. This Court believes the rule should be the same whether the claim of misconduct occurs before or after final submission of the case. Such seems to be the general rule and the following are just a few of the many cases on the point. State v. Ferguson, 182 SW 2d 38; Huddleston v. State, 64 Southern 2d 90 (Ala.); Gossett v. State, 48 SE 2d 71 (Ga.); State v. Finnell, 280 SW 2d 110 (Mo.); Lindsey v. State, 25 SW 2d 533 (Tenn.); People v. Evans, 246 Pac. 2d 636 (Cal.); State v. Oliver, 192 Southern 725 (La.); and State v. Ingersoll, 292 Pac. 250 (Mont.). Such will likewise be the ruling of this Court. See Locicero v. State, 14 Abs. 109.

Under the rule barring testimony of jurors to impeach their own verdict, it is nevertheless almost universally held that testimony of jurors, however, may be admitted to sustain the verdict and this procedure is resorted to most often when a prima facia showing of misconduct is first made; but in the present case, since the Court has ruled that the affidavit and testimony of the two jurors are inadmissible to impeach this verdict, the State's affidavits of thirteen jurors, seeking to sustain the verdict by showing no misconduct, are irrrelevant."

"Next it is argued that the defendant did not have a fair and impartial jury as required by the constitution for the reason that juror Gillespie had a prior fixed opinion that the defendant was guilty and withheld disclosure of such opinion upon inquiry on voir dire. In support of this contention, reference was made to the voir dire examination, and the affidavit and oral testimony of propective juror Osborne were offered and admitted in evidence. In the opinion of the Court, the contention of the defense is not supported in either respect. In the first place, questions put upon voir dire clearly indicated that the juror had discussed the case pro and con, that opinions on guilt or innocence had been expressed, and indicated he may have expressed such an opinion himself. He did, however, answer unequivocally that he had no opinion as to guilt or innocence as he was then questions."

"Osborne's affidavit is direct and positve and by its language certainly would tend to indicate a false answer on the part of Gillespie when inquired of on voir dire examination. The Court, however, recognizes, as well he must, that the affadvait is in the language of defense counsel and not necessarily in the language of the witness. Osborne's oral testimony regarding the same subject, on the other hand, is much less specific, somewhat equivocal, and indicates the possibility that whatever he heard may have been spoken by one of four in a group of prospective jurors, two of whom were excused upon challenge for cause because they held fixed opinions on either guilt or innocence."

"Osborne was positive that some of the conversation he attributed to Gillespie took place on Wednesday, the third day of trial, whereas the minutes of the trial show that both were called into the Jury Box on Tuesday, the second day of trial, and Osborne was then excused because he had a very definite opinion in opposition to capital punishment. Osborne admits that he had no direct conversation with Gillespie but claims the statements attributed to him were remarks that he overheard in a group conversation."

"Gillespie categorically denied any such statements as attributed to him by Osborne and various others of the prospective jurors in company with Osborne and Gillespie in the assigned place for the meeting of the prospective jurors deny hearing any such statements from Gillespie. The Court fails to find under this state of the evidence that prospective juror Gillespie testified falsely upon voir dire and further holds that the defense has not sustained its burden of proof in this regard."

FOURTH REASON

As to the contention of the defendant that the Court erred in permitting the amendment to the indictment, this Court's attention is directed to the preceeding statements of facts and to page nineteen (19) of Petitioner's petition, where the amendment to the indictment is set forth. In essence, the Trial Court permitted the State to amend the indictment by adding the words "or attempting to perpetrate rape" after the words "while in the perpetration of a rape" in the indictment. Defendant claimed below and here claims that the addition of such language constituted the addition of a second charge or a new crime to the indictment. In the case of Bryant v. State of Ohio, 48 App. 208, Hamilton County 1933, appeal dismissed 127 O.S. 593, the Court of Appeals for Hamilton County, considering the statutory authority granted the Trial Court, and found in Section 2941.30 Revised Code, (quoted in part on page 19 of Petitioner's Petition), found no error in the Trial Court's allowing the State to amend an indictment, from murder while committing a robbery, to murder while attempting to commit a robbery. The Court said at page 210 of that decision:

"The first question presented involves the nature of the amendment. Was there any change made in the name or identity of the crime charged? We conclude that there was no such change. The crime charged originally and in the indictment as amended was murder in the first degree. Of this crime the defendant was con-

victed. Even if such were not our conclusion, it is obvious from a reading of the record that the defendant was not misled or prejudiced by the variance in respect to which the amendment was made, nor has any failure of justice resulted."

A similar conclusion reached in the case of State v. Holt, 59 O. App. 309, Court of Appeals for Franklin County, (1938).

If the Trial Court had not permitted the amendment and the defendant had been acquitted, there can be no doubt that a trial on a later indictment alleging murder while attempting a rape would constitute double jeopardy.

Section 2941.30 Revised Code, grants a Trial Court authority to permit an amendment to the indictment in form or substance, provided only that there may be thereby made no change in the name or identity of the crime. The defendant was charged with the crime of murder in the first degree and the amendment herein permitted in no way changes that charge.

The second contention of the defendant regarding the amendment to the indictment is that the granting of such amendment was not supported by facts and therefore the Court had no authority under the statutes to permit the amendment. The amendment was one from a killing while perpetrating a rape to a killing while attempting to perpetrate a rape. At the time the amendment was permitted there had been introduced the medical testimony set forth in the statement of facts and the photographs taken of the body of the deceased. The deceased lay in a hardened pool of her own blood. She was on her back and her legs were spread. The body was nude. Her coat was spread under her buttocks. There was a stab wound in her chest from which blood had flowed over her shoulder, clearly indicating that the blood was flowing from the wound as she lay. There was blood on her blouse and a cut in its material indicating that she was stabbed while wearing the blouse. Her face was crushed. Medical testimony concluded that there had been intercourse, but this conclusion was based upon a finding of acid phosphatase with no spermatozoa. Under this state of the evidence, there can be no

doubt that the Court was fully warranted in permitting the amendment to include attempt of rape which simply excluded the need to prove penetration. There is no other conclusion that any reasonable mind could draw from these facts.

Regarding the cases cited by the defendant in support of his contention, the State has never claimed and does not now claim that it was attempting to add vital or material elements of the offense. The matter added to the indictment does not accomplish this end. The citations are, therefore, of no effect in determining the point raised by the defendant.

FIFTH REASON

Here, as in the earlier assignments of error, the defendant's argument is predicated upon a misconception of the evidence. The defendant and his wife had testified on behalf of the defense, that the defendant had come home at approximately 1:30 A.M. on September 15, 1964, and that she and the defendant remained home the rest of the evening. Mrs. Rosemary Karr testified in rebuttal that she had seen the defendant's wife leave the home at approximately 3:10 A.M. on the same morning. This testimony was clearly in reply to the testimony given for the defense and as such was proper rebuttal testimony, 52 O.Jur. 2d, 561, Trial, Section 75.

At page 24 of his petition, the Petitioner cites the case of Itskin v. State, 51 App. 211 (1953), for the proposition that there exists in Ohio the right in the defense to submit surrebuttal in answer to rebuttal. The same contention is made by the defense for the case of State v. Lett, 106 App. 285 (1958). Section 2945.10 Revised Code providing for the order of proceeding in trial, grants no right of surrebuttal, and reads in pertinent part as follows:

> "Trial of an issue upon an indictment or information shall proceed before the Trial Court or jury as follows:...
>
> (D) The State will then be confined to rebutting evidence, but the Court, for good reason, in furtherance of justice, may permit evidence to be offered by either side out of its order.....

The Court may deviate from the order of proceedings listed in this section."

This specific statutory procedure was followed in the instant case and in an effort on the part of the Trial Court to grant wide latitude to the defendant, the Court permitted the defendant and his wife to testify as surrebuttal witnesses.

As stated above, the defendant's claim rests upon the ill-conceived premise that the rebuttal testimony was improper because, at least in the view of the defendant, it had a tendency to prove that he, the defendant, did not return home when he said he did. It is submitted that even if this be so, such evidence is proper rebuttal evidence. In this regard the Court's attention is directed to the third paragraph of the syllabus of the case Holt v. Ohio, 107, O.S. 307, which reads as follows:

"Where, in the trial of a criminal case, evidence is introduced in rebuttal by the State to meet a claim or theory of the defense, the fact that such evidence also tends to prove some element or elements of the State's case in chief does not make such testimony inadmissible, nor is the State deprived of the benefit thereof as tending to prove the commission of the offense alleged in the indictment. The admission of evidence out of its order rests in the sound discretion of the Court. Unless some abuse of such discretion appears, when taken in connection with all the evidence in the case, such as to show that a party was prevented from having a fair trial, a verdict will not be disturbed upon that ground."

The Trial Court, in its Opinion to a Motion for New Trial, as set forth in Petitioner's Appendix pages 5 and 6, stated with regard to the permission given the defendant and his wife to testify in surrebuttal:

"The Court permitted the defendant and his wife to testify, as above noted. The Court's reasoning at the time was substantially this, that an explanation as to why the wife left the house at that hour ought to be allowed. Of course, she denied rather than explain it. This is not to say, however, that because the Court exercised its discretion in that direction with reference to that possible testimony the Court was required to back up and thereafter allow the introduction of the photographs and other testimony above referred to, or having barred the photographs and other testimony in denial of the witness Karr necessarily meant that the denial should

carry through to the wife and the defendant and thereby bar the possible explanation of her leaving the house. It should be kept in mind that the issue of fact was first raised by the defense testimony and not during the State's case in chief. It does not seem that the point of abuse of discretion is well taken."

The statute grants the State a right to rebut. The defense wanted to bring in witnesses and testimony not to deny, but to cast doubt, photos at angles, witnesses who did not hear anyone go out, and amateur weathermen. If the Court granted that, then could not the State bring in photos from different angles, an expert weatherman, and perhaps someone who heard a door close: The trial must end and the statute says it ends at rebuttal unless the Court permits otherwise.

There is no abuse of discretion on the part of the Trial Court.

SIXTH REASON

The question as to whether or not the imposition of the death penalty is cruel and unlawful punishment and, therefore, violative of the Eighth Amendment of the United States Constitution has been before this Court on numerous occasions. It should be noted that almost a century ago, In the matter of William Kemmler, Petitoner, 136 U.S. 436, 34 L ed 519, 10 S.Ct. 930 which was decided on May 23, 1880, the Supreme Court of the United States had before it the question of the constitutionality of a law of the State of New York, wherein it was declared that the punishment of death must be inflicted by causing to pass through the body of the convict a currenct of electricity of sufficient intensity to cause death.

The Court stated that:

"If the punishment prescribed for an offense against the laws of the State were manifestly cruel and unlawful, as burning at the stake, crucifixion, breaking on the wheel or the like, it would be the duty of the Courts to adjudge such penalties to be within the constitutional prohibition."

However, the Court ruled that "this Statute was in itself within the legitimate sphere of the legislative power of the State, and in the observance of these general rules prescribed by our system of jurisprudence; and the Legislature of the State of New York determined that it did not inflict cruel and unusual punishment, and its Courts have sustained that determination. We cannot percieve that the State has thereby abridged the privileges or immunities of the Petitioner, or deprived him of due process of law."

Concerning the imposition of the death penalty the following is noted in 30 ALR 1452;

> "The punishment of death is not in violation of the constitutional prohibition of cruel or unlawful punishment unless it is so inflicted that it involves lingering death, torture, or such practices as disgrace the civilization of former ages. So long as the death inflicted is speedy and without undue pain or torture, the provision is not violated." (See also Holt v. State of Ohio, supra.)

Therefore, the suggestion of the Petitioner that the death penalty be abolished in every state should be held for naught, and each State be allowed, as they have been in the past, to determine the manner and method of punishment for those who violate the law.

SEVENTH REASON

The question as to whether the exclusion of prospective jurors on the sole ground that they are opposed to capital punishment is violative of the Sixth Amendment to the United States Constitution has also been a subject of Court review on numerous occasions and has been ruled upon in the State of Ohio as far back as 1847. In the matter of Samuel Martin v. State of Ohio, 16 Ohio Reports 364, the Court stated:

> "When a juror states that he is on principle opposed to capital punishment, and that his opinion will influence his decision against the law and the evidence, he may be challenged by the State for cause."

Concerning the causes of challenging of jurors, it should be noted that Section 2945.25 Revised Code states the following

> "A person called as a juror on an indictment may be challenged for the following cause:
>
> (C) In the trial of a capital offense, that his opinions preclude him from finding the accused guilty of an offense punishable with death."

In 48 ALR 2d 563 the following is noted:

> "It is a general rule that the State, as well as the defendant, in the trial of crimes punishable by death, has the right to an impartial jury, and in order to secure it, has the right to challenge for cause any prospective juror who is shown to entertain beliefs regarding capital punishment which would be calculated to prevent him from joining in any verdict carrying the death penalty."

It is, therefore, requested that Petitioner's assertion that such selection of jurors is violative of the Sixth Amendment be denied.

CONCLUSION

For the reasons hereinabove set forth it is respectfully submitted that the Petitioner's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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A copy of the within "Brief for the State of Ohio in Opposition" was personally delivered to the office of Nazor and Nazor, Ashtabula, Ohio, Attorneys for Petitioner, on the 20th day of May, 1968.

Joseph E. Mahoney

JOSEPH E. MAHONEY,
PROSECUTING ATTORNEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

LOPINSON *v.* PENNSYLVANIA; and

COYLE *v.* PENNSYLVANIA.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT.

PRUETT *v.* OHIO.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

Nos. 1133, 1095, Misc., and 1700, Misc. Decided June 17, 1968.

PER CURIAM.

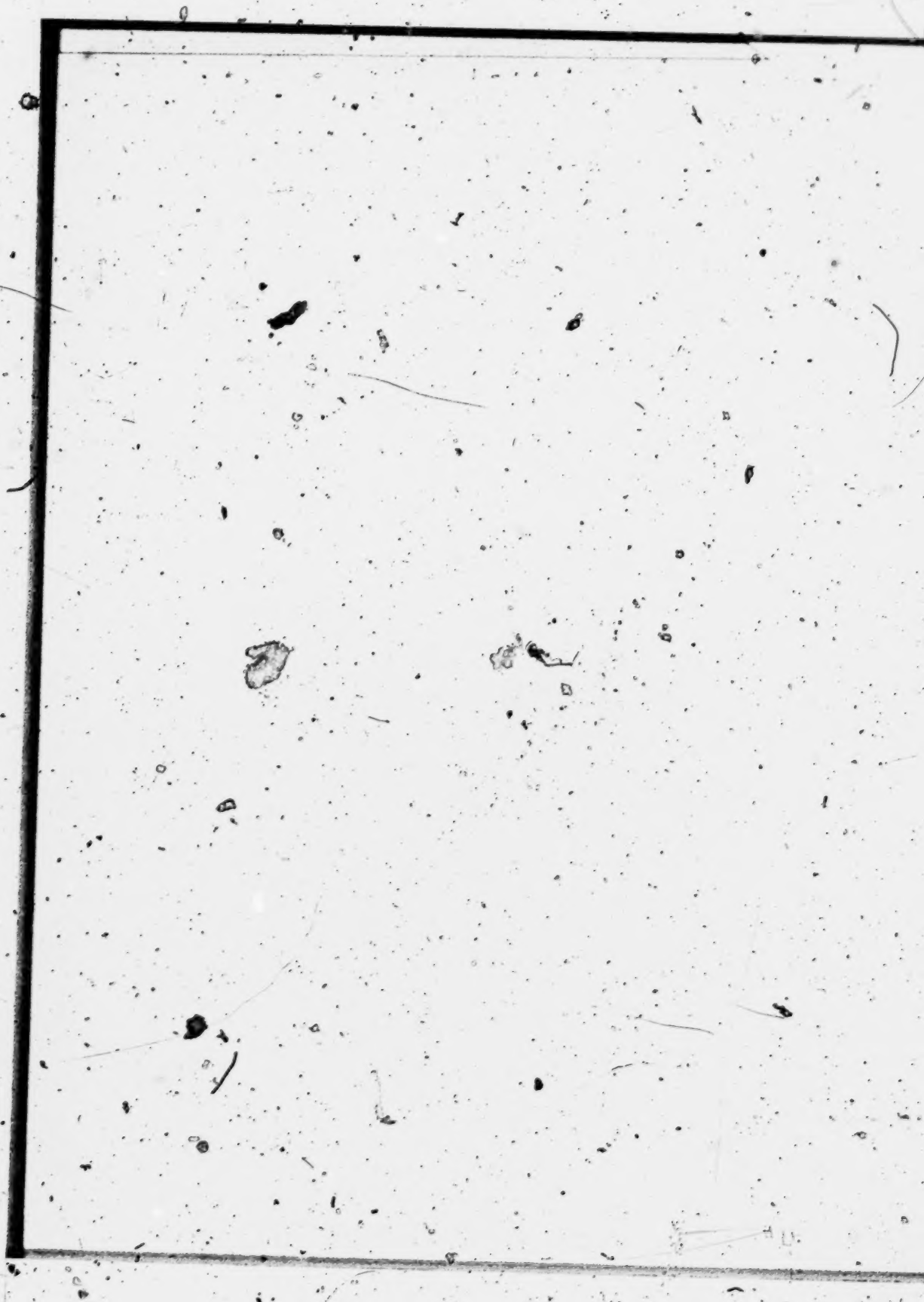
The motions for leave to proceed *in forma pauperis* in Nos. 1095, Misc., and 1700, Misc., are granted and the petitions for writs of certiorari in all three cases are granted. Without reaching the petitioners' other claims, the judgments are vacated and the cases remanded for reconsideration in the light of *Witherspoon* v. *Illinois*, 1015, decided June 3, 1968.

MR. JUSTICE HARLAN dissents for the reasons stated in MR. JUSTICE BLACK's dissenting opinion in *Witherspoon* v. *Illinois*, No. 1015, decided June 3, 1968.

MR. JUSTICE WHITE dissents for the reasons stated in his dissenting opinion in *Withrspoon* v. *Illinois*, No. 1015, decided June 3, 1968.

MR. JUSTICE BLACK, dissenting.

In all three of these cases the Court remands to the state courts on one single constitutional claim of petitioners *without reaching other constitutional claims raised by them*. The result is that after the state courts rule on the single remand issue this Court will undoubtedly be called on to pass on the other issues which the



Court refuses to decide. At the very least this means postponement of a final decision in these cases a year or two years or three years, unless, that is, this Court should, on the second review, choose once more to decide the cases piecemeal. Piecemeal dispositions of criminal cases inevitably cause delays and hamper enforcement of the criminal laws and there is a lot of truth in the old adage that delay is a defendant's best lawyer. See *Witherspoon* v. *United States*, — U. S. —, where a murder sentence was reversed nine years after the murder. It is true that under *Fay* v. *Noia*, 372 U. S. 391, a certain amount of delay is inevitable in criminal cases, but that is not true in these cases where the issues are squarely presented to us here and now.